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No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

VENUS MANDLEY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. —

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

VENUS MANDLEY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health, Education, and Welfare, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals of November 23, 1976 (App. A, *infra*), is reported at 545 F. 2d 1062. The order of the district court of July 12, 1976, dismissing the case as moot (App. B, *infra*), is not reported. The opinion of the court of appeals of September 25, 1975 (App. C, *infra*), is reported at 523 F. 2d 415. The district court's decision and orders

of March 14, 1975 (App. D, *infra*), and November 21, 1974 (App. E, *infra*), are not reported.

JURISDICTION

The judgment of the court of appeals (App. J, *infra*) was entered on November 23, 1976. A timely petition for rehearing was denied on December 14, 1976 (App. F, *infra*). On March 4, 1977, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including April 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary has authority under Section 403(a)(1) of the Social Security Act to reimburse amounts expended by the states in providing emergency "aid to families with dependent children" within the meaning of Section 406(b) of the Act.

2. Whether those states that elect to provide "emergency assistance to needy families with children," within the meaning of Section 406(e)(1) of the Act, must furnish such assistance to all needy families with children to the extent necessary to avoid destitution.

3. Whether the court of appeals abused its equitable discretion in ordering nationwide relief on behalf of a statewide class.

STATUTES AND REGULATIONS INVOLVED

Sections 401, 402(a) (1) and (10), 403(a) (1) and (5), and 406 (a), (b), and (e) of the Social Security

Act, 49 Stat. 620, 627, as amended, 42 U.S.C. (and Supp. V) 601, 602(a) (1) and (10), 603(a) (1) and (5), and 606 (a), (b), and (e), and the relevant regulations of the Department of Health, Education, and Welfare, are set forth in pertinent part in Appendix G, *infra*.

STATEMENT

1. Pursuant to Title IV–A of the Social Security Act, 42 U.S.C. (and Supp. V) 601, *et seq.*, federal assistance is furnished to the states "[f]or the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives * * *." Section 401 of the Act, 42 U.S.C. 601. The federal assistance is made available to those states that adopt a "plan for aid and services to needy families with children" that satisfies the requirements of Section 402(a) of the Act, 42 U.S.C. (Supp. V) 602(a), and is approved by the Secretary of Health, Education, and Welfare under Section 402(b).

One of the requirements imposed upon state plans is that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." Section 402(a)(10) of the Act. The term "aid to families with dependent children" is defined in Section 406(b) generally to mean "money payments with respect to * * * a dependent child or dependent children." In turn, "dependent child" is defined in Section 406(a) to mean "a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who

is living [in the home of a relative], and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one [if a student]."

The amount of monthly assistance provided to individual families with dependent children is determined by the state subject to the general guidelines provided by Section 402(a). A percentage of the amounts expended by a state as aid to families with dependent children pursuant to its approved plan is reimbursed by the federal government; the reimbursement for each state is determined in accordance with the formula prescribed by Section 403(a)(1) of the Act.[1]

Section 402(a) does not require participating states to provide assistance to meet special emergencies. The Secretary's regulations, however, permit states to include in their plans assistance with respect to "special need items" incurred by families with dependent children. 45 C.F.R. 233.20(a)(2)(v). We are informed by the Secretary that approved state plans have included such special need items as, for example, emergency needs arising from catastrophe or natural disaster and emergency child care. State payments with respect to such special need items on behalf of families with dependent children have been reimbursed by the federal government pursuant to Section 403(a)(1), in accordance with the same formula that governs reimbursement of other amounts

[1] The amount of reimbursement to which Puerto Rico, the Virgin Islands, and Guam are entitled is determined in accordance with Section 403(a)(2) of the Act.

expended by the states as aid to families with dependent children.

The Secretary also is authorized, under Section 403(a)(5) of the Act, to reimburse 50 percent of the amounts expended by the states "as emergency assistance to needy families with children." The emergency assistance reimbursable under that provision may be provided to persons in addition to "families with dependent children." Section 406(e)(1) defines "emergency assistance to needy families with children" to mean assistance to "a needy child under the age of 21 who is * * * living with * * * relatives * * *, but only where such child is without available resources [and] the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child * * *."

Thus, unlike the payment of "special need items" as aid to families with dependent children, "emergency assistance to needy families with children" may be furnished without regard to whether the child has been deprived of parental support. Compare Section 406(a) with Section 406(e)(1). On the other hand, as to any given family, "emergency assistance to needy families with children" provided by a state is reimbursable by the federal government only "for a period not in excess of 30 days in any 12-month period." Section 406(e)(1). No such limitation governs reimbursement of amounts expended for "special need items" as aid to families with dependent children. Finally, the

amount of federal reimbursement may differ depending upon whether payments are made as aid to families with dependent children or as emergency assistance to needy families. Compare Section 403(a)(1) with Section 403(a)(5).[2]

2. In 1973, the Secretary approved the adoption by the State of Illinois of a program of "emergency assistance to needy families with children" within the meaning of Section 406(e). Under that program, the State limited eligibility to persons also eligible for (and applicants presumptively eligible for) aid to families with dependent children (AFDC), and it limited coverage to the emergency need for shelter resulting from building damage or eviction for reasons other than failure to pay rent and the emergency need for clothing or furnishings (App. C, *infra*, p. 29A).

Respondents, who are "Illinois recipients of the Aid to Families with Dependent Children (AFDC) program and the Illinois and Chicago Welfare Rights Organizations" (App. C, *infra*, p. 25A), brought this class action against the Illinois Department of Public Aid and its director in the United States District

[2] States participating in the medicaid program under Title XIX of the Act alternatively may substitute the medicaid reimbursement formula prescribed by Section 1905 of the Act, 42 U.S.C. (and Supp. V) 1396d, to determine the total reimbursement to which they are entitled under Sections 3(a), 403(a), 1003(a), 1403(a), and 1603(a) of the Act. See Sections 1118 of the Act, 42 U.S.C. 1318. Under the medicaid reimbursement formula, "the Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum." Section 1905(b) of the Act.

Court for the Northern District of Illinois, challenging the validity of the eligibility and coverage restrictions of the State's emergency assistance program. The state defendants joined the Secretary as a party defendant.

Respondents contended, *inter alia*, that the eligibility and coverage restrictions on the State's emergency assistance program violated the Social Security Act. In particular, they asserted that if a state adopts such a program, it must provide such assistance to all needy families with children to whom assistance may be provided under Section 406(e)(1), not just to persons eligible for AFDC assistance, and that such assistance must cover all emergency situations posing the risk of destitution, not just particular emergency needs (App. C, *infra*, p. 31A). Respondents requested declaratory and injunctive relief, including an order requiring expedited processing of claims for assistance (App. C, *infra*, p. 26A).

The district court sustained the State's program of emergency assistance as valid (App. E, *infra*, pp. 50A–51A). The court of appeals reversed (App. C, *infra*). The court of appeals reasoned that Section 402(a)(10), which requires that AFDC benefits "shall * * * be furnished with reasonable promptness," was intended to impose a like requirement with respect to emergency assistance benefits, and that the definition of "emergency assistance to needy families with children" in Section 406(e)(1) thereby furnished mandatory standards for eligibility under, and

coverage of, emergency assistance programs. The court of appeals remanded the case to the district court for entry of appropriate relief.

3. Before the time for filing a petition for a writ of certiorari for review of the judgment of the court of appeals had expired, the State notified the Secretary of its election to terminate its emergency assistance program (C.A. Joint Appendix at 9–70).[3] On remand, therefore, the district court dismissed the case as moot (App. B, *infra*).

The court of appeals again reversed (App. A, *infra*). The court noted that when the State terminated its emergency assistance program, it had amended its AFDC plan to provide coverage for "special need items" identical in substance to the emergency need items that formerly had been covered by its emergency assistance program (App. A, *infra*, p. 12A). The court then held that, contrary to the Secretary's longstanding regulations, emergency special need items may not be covered under an AFDC plan but rather may be covered only under an emergency assistance plan (App. A, *infra*, pp. 13A–18A). The court concluded that the "special need items" component of the State's AFDC plan was, as a matter of law, a continuation of its invalidated emergency assistance plan and that the case therefore was not moot (App. A, *infra*, pp. 10A, 18A).

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[3] A copy of this joint appendix, which was filed with the Court of appeals in No. 76–1865, has been lodged with the Court.

The court of appeals remanded to the district court with instructions to enter judgment in accordance with respondents' proposed final judgment (with certain modifications noted in its opinion) (App. A, *infra*, pp. 20A–23A). Included in that judgment (App. H, *infra*, pp. 71A–72A) were requirements that the Secretary promulgate regulations conforming to the two opinions handed down by the court of appeals;[4] that the Secretary approve state plans for emergency-type assistance only where such assistance is to be provided to all persons to whom assistance may be provided under Section 406(e)(1) and for all emergency situations posing a risk of destitution; and that the Secretary not reimburse expenditures made under state programs for emergency-type assistance, however designated, under any statutory authority other than Section 403(a)(5).

REASONS FOR GRANTING THE PETITION

This case presents questions of major importance to the administration of the federally assisted programs of aid to families with dependent children and emergency assistance to needy families with children. The court of appeals did not understand the different characteristics of these two programs and as a consequence committed serious errors in construing the definitional and funding provisions that govern them.

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[4] The Secretary submitted proposed regulations to the district court on February 22, 1977.

Moreover, even though respondents represent only a statewide class, and the programs of only a single state were involved in the litigation, the court of appeals has ordered the district court to enter a judgment that may adversely affect the operations of the AFDC or emergency assistance programs of virtually every state in the Union. The court's order that the Secretary not reimburse expenditures for programs of emergency-type assistance under any statutory authority other than Section 403(a)(5) of the Act calls into question the Secretary's authority to reimburse state payments for emergency "special need items" made under AFDC plans, since such reimbursement is paid under Section 403(a)(1) of the Act and not under Section 403(a)(5) (see pp. 3–6, *supra*); at present, 45 states include special need items in their AFDC plans (App. I, *infra*, p. 78A),[8] and the federal assistance available to such states with respect to such items may be required to be reduced or terminated if the decision below is not reversed. Similarly, the court's order that the Secretary not approve state plans for emergency-type assistance unless they satisfy the eligibility and coverage requirements set forth in the court's opinions may affect the emergency assistance programs of the 27 states that have adopted such programs (App. I, *infra*, p. 78A).

[8] Appendix I sets forth the affidavit of Nicholas Norton, Commissioner, Assistance Payments Administration, Department of Health, Education, and Welfare, which was submitted to this Court in support of the Secretary's application for a stay on February 18, 1977.

In short, although there is no conflict among the courts of appeals on the statutory issues presented,[6] the entry of nationwide relief in this case has deprived the Secretary of the opportunity effectively to litigate the issue before other courts of appeals. In these circumstances, this case presents "important question[s] of federal law which [have] not been, but should be, settled by this court." Rule 19(1)(b) of the Rules of this Court.

1. The Secretary has authority under Section 403 (a)(1) of the Act to reimburse amounts expended by the states in providing emergency "aid to families with dependent children" within the meaning of Section 406(b). The Secretary's regulations permit state AFDC plans to include coverage of "special need items." 45 C.F.R. 233.20(a)(2)(v). This administrative interpretation long antedates the enactment of authority for the emergency assistance program in 1968 (81 Stat. 893). See, *e.g.*, *Handbook of Public Assistance Administration,* Part IV, Section 3131(3) (February 23, 1966); *Handbook of Public Assistance Administration,* Part IV, Section 3131(2) (February 14, 1949). This long-standing construction of the statute by the agency charged with its administration is entitled to great weight. See, *e.g.*, *Udall* v. *Tallman,* 380 U.S. 1, 16.

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[6] The Third Circuit, following a different line of reasoning, also has concluded that emergency assistance programs must cover all persons who are potentially eligible under Section 406(e). *Williams* v. *Wohlgemuth*, 540 F. 2d 163.

Congress' principal purpose in authorizing the emergency assistance program was to give the states additional flexibility to deal with short-term and catastrophic emergencies. See, *e.g.*, H.R. Rep. No. 544, 90th Cong., 1st Sess. 109 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 165–166 (1967). For that reason, emergency assistance was permitted to be paid to needy families with children, without reference to the special AFDC eligibility requirements, but only for a period of not more than 30 days in any consecutive 12-month period. See Section 406(e)(1) of the Act. But nothing in the legislative history suggests an intention to limit the duration of emergency-type assistance paid to AFDC beneficiaries under state AFDC plans to only 30 days. Nothing in the legislative history, in other words, suggests an intention to bar the states from continuing to provide emergency-type assistance under their separate AFDC plans, whether or not they choose to adopt emergency assistance plans as well.

Moreover, as if to emphasize the distinctness of the two programs, Congress enacted a separate funding provision governing only emergency assistance programs. Thus, whereas federal reimbursement of state AFDC payments is made according to the formula set forth in Section 403(a)(1) of the Act, state emergency assistance payments are reimbursed at the flat rate of 50 percent under Section 403(a)(5).[7]

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[7] The court of appeals based its holding on the mistaken belief that reimbursement of emergency "special need items" under Sec-

Since the programs manifestly are different in their implications for potential beneficiaries, for the states, and for the federal government, it was not merely a sham for the State of Illinois in this case to terminate its emergency assistance program and, in place of that program, amend its AFDC plan to include emergency special need items. Accordingly, the district court correctly determined that the State's termination of its emergency assistance program rendered respondents' attacks on that program moot, and the court of appeals erred in reversing that determination.

2. States that elect to provide "emergency assistance to needy families with children," within the meaning of Section 406(e)(1) of the Act, need not furnish such assistance to all such needy families in every emergency situation posing a risk of destitu-

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tion 403(a)(1) would reduce the amount of federal funds made available for other AFDC payments (see App. A, *infra*, pp. 18A–19A). Section 401 of the Act authorizes appropriations of "a sum sufficient to carry out the purposes" of Title IV–A and provides that the monies "made available under this section shall be used for making payments to states" with approved plans. In turn, Section 403(a)(1) requires that the Secretary of Treasury "shall pay" to the states the amounts calculated according to the formula there prescribed. There is no authorization ceiling that limits total federal reimbursement in a way that would require a reduction in federal reimbursement of other AFDC benefits in order to accommodate the reimbursement of emergency AFDC benefits.

Moreover, appropriation acts for Title IV–A do not distinguish between AFDC and emergency assistance programs. See, *e.g.*, Pub. L. 94–439, 90 Stat. 1418, 1429. Expenses incurred under one program therefore would be as readily reimbursed, within the limits of appropriated funds, as those incurred under the other.

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tion.[8] In holding otherwise, the court of appeals rested its analysis on Section 402(a)(10) of the Act. But that provision explicitly refers only to AFDC programs, not to emergency assistance programs. It states: "*aid to families with dependent children* shall * * * be furnished * * * to all eligible individuals" (emphasis added). Yet the court of appeals concluded that the requirement of Section 402(a)(10) should be extended to emergency assistance programs, because AFDC and emergency assistance programs are closely related (App. C, *infra*, pp. 36A–38A).[9]

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[8] This issue originally was decided by the court of appeals in its first opinion (App. C, *infra*). Certiorari was not then sought, because the issue of mootness remained for consideration in the district court (see p. 8, *supra*) and the judgment of the court of appeals implicated the AFDC and emergency assistance programs of only a single state. The court of appeals reaffirmed its holding on this issue in its second decision and broadened the relief to affect the programs of other states not parties to the litigation. In these circumstances, the issue may be brought before this Court on petition for a writ of certiorari to review the second judgment. See, *e.g.*, *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257–258. See also *Messenger* v. *Anderson*, 225, U.S. 436, 444. Cf. *Piper* v. *Chris-Craft Industries, Inc.*, No. 75–353, decided February 23, 1977.

[9] The court noted that Section 406(e)(2) partially exempts emergency assistance programs from the requirement, imposed by Section 402(a)(1), that programs be in effect in all political subdivisions of the state. The court inferred that emergency assistance programs were not exempted from any of the other requirements of Section 402(a), including the mandatory eligibility requirement of Section 402(a)(10). But the court overlooked that, unlike the other requirements imposed by Section 402(a), which apply generally to plans "for aid and services to needy families with children," including emergency assistance programs, Section 402(a)(10) by its terms applies only to "aid to families with dependent children."

"This departure from ordinary principles of statutory interpretation is not supported by [this] Court's prior decisions." *Burns* v. *Alcala*, 420 U.S. 575, 580. Although the AFDC and emergency assistance programs are closely related, nevertheless they are separate and distinct programs, and the statutory provisions relating to each should be given separate effect.

The statutory provisions explicitly addressed to emergency assistance programs are Sections 403(a)(5) and 406(e)(1). The former simply authorizes the Secretary to reimburse state payments of "emergency assistance to needy families with children." The latter defines such emergency assistance in broad terms, setting forth the outside limits of a state's discretion to make reimbursable emergency assistance payments. Nothing in either provision requires the states to choose between making such payment either to all needy families with children or to none, and between making such payments either in all emergency situations posing a risk of destitution or in no emergency situations at all.

The legislative history of Sections 403(a)(5) and 406(e)(1) indicates that it was intended that the states would have flexibility in devising emergency assistance programs. See Hearings on H.R. 12080 (Social Security Amendments 1967) before the Senate Committee on Finance, 90th Cong., 1st Sess. 717, 1306 (1967). Consistent with that history, the Secretary has read Section 406(e)(1) simply as prescribing the outer limits within which the states have flexibility to estab-

lish eligibility and coverage limitations. 45 C.F.R. 233.120(a)." The court of appeals did not accord this consistent administrative interpretation the weight to which it was entitled. See *Udall* v. *Tallman*, *supra*, 380 U.S. at 16.

3. The court of appeals abused its equitable discretion in ordering nationwide relief on behalf of a statewide class. Respondents represent only Illinois AFDC recipients and welfare organizations (App. C, *infra*, pp. 25A, 45A), and they instituted this litigation solely to challenge the validity of that State's emergency assistance program. Yet the court of appeals has ordered the Secretary to revise his administration of the Act on a nationwide basis.[11]

Many states, and many AFDC and emergency assistance recipients in those states, may be adversely

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[10] Shortly after Section 406(e) became effective, the Secretary issued interim regulations providing that the states were free to specify conditions of eligibility for emergency assistance, within the limits set by the statute. 33 Fed. Reg. 10229 (July 17, 1968). The regulations were made permanent on January 10, 1969. 34 Fed. Reg. 393.

[11] The order requiring the Secretary to promulgate regulations in accordance with the court's opinions constitutes a "forbidden judicial intrusion into the administrative domain." *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 670. The Secretary, not the courts, is delegated authority to determine whether and, if so, what regulations are "necessary to • • • efficient administration." Section 1102 of the Act, 42 U.S.C. 1302. It is inappropriate for a court affirmatively to order a particular exercise of that delegated authority. *United States ex rel. Redfield* v. *Windom*, 137 U.S. 636, 643–644. Cf. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20–21.

affected. By barring the Secretary from approving state emergency assistance plans that do not satisfy the eligibility and coverage requirements that the court read into the statute, the decision below may invalidate many such plans (see p. 10, *supra*); states having such plans apparently will be required either to terminate them or to expand them in a manner that they may regard as prohibitively costly.[12] Similarly, the decision below may bar the Secretary from reimbursing the states for their pament of emergency special need items under their AFDC plans. If so, the affected states would be required either to terminate such payments, to continue such payments without federal reimbursement, or to provide such payments as part of a considerably more costly emergency assistance programs.

The court of appeals should not have ordered the Secretary to take action having such far-reaching, nationwide consequences. The granting of such broad injunctive relief, in a case involving only a statewide class, violates the principle that injunctions are to be used sparingly, to provide only the degree of relief needed to afford redress. See, *e.g.*, ***Milliken*** v.

[12] Illinois and Wisconsin have terminated their emergency assistance programs because of the additional expense that would be incurred in implementing the requirements of the opinions below and similar litigation, and Arkansas has suspended its program due to "severe financial difficulties" (App. I, *infra*, p. 82A).

Bradley, 418 U.S. 717, 738, 744; *Whitcomb* v. *Chavis*, 403 U.S. 124, 160–161; *Irwin* v. *Dixion*, 9 *How.* 10, 33.[11]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1977.

[11] Furthermore, the unnecessary granting of nationwide relief against federal officers places a burden on this Court. Holdings that might not warrant this Court's review if relief had been narrowly tailored necessarily assume substantially greater significance when the relief requires revision in the nationwide administration of a federal program.

APPENDIX A

United States Court of Appeals for the Seventh Circuit

No. 76–1865

VENUS MANDLEY ET AL., PLAINTIFFS-APPELLANTS

v.

JAMES L. TRAINOR ET AL., DEFENDANTS-APPELLEES

Argued Nov. 4, 1976—Decided Nov. 23, 1976

Rehearing and Rehearing En Banc—Denied Dec. 14, 1976

Before CUMMINGS and TONE, Circuit Judges, and CAMPBELL, Senior District Judge*

CUMMINGS, Circuit Judge.

This appeal is a sequel to the proceedings discussed in our earlier opinion reported in 7 Cir., 523 F.2d 415 (1975) (*Mandley I*). There we held that the Illinois Emergency Assistance Program for needy families with children defined eligibility more narrowly than Section 406(e)(1) of the Social Security Act (42 U.S.C. § 606(e)(1)) and therefore violated the Act. Our mandate was returned to the district court on October 24, 1975.[1] On November 26, the plaintiffs sub-

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*Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

[1] In December 1975, the Department of Health, Education, and Welfare requested and received an extension of time in which to

mitted a proposed final judgment and decree disposing of the controversy. A few days thereafter the state defendants filed a motion to dismiss the cause of action on the ground that on November 21, 1975, Illinois had withdrawn from participation in the Emergency Assistance Program established under Section 406(e). They did not inform the Court that they intended to carry on virtually the same program [2] under a different name but still with the usual 50 per cent federal funding as part of their regular Aid to Families with Dependent Children (AFDC) program. The record shows that this new plan was to avoid our September 25 decision and was conceived as early as November 17, 1975, and formally presented to HEW on April 23, 1976, but effective January 1, 1976. However, on November 18, the state defendants misled the Court by asserting that only state funding would be employed.

HISTORY OF EMERGENCY ASSISTANCE AFTER *MANDLEY I*

In order to understand how the state defendants have vacillated between affected compliance with Mandley I and a final blatant disregard of the congressional eligibility requirements enforced thereby,

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petition the Supreme Court for certiorari. However, no petition for certiorari was ever filed. In January 1976, the Department sought to have us recall our mandate on the ground of mootness but we denied its petition on January 30, 1976.

[2] In a letter dated March 9, 1976, from Director Trainor of the Illinois Department of Public Aid to the Legislative Advisory Committee on Public Aid, Trainor revealed: "the special needs program we substituted affords the virtually same benefits and employs the delivery system we were using prior to the Court's ruling that our program was not in accord with S406(e) of the Social Security Act. Thus, there has been no effect upon the recipients * * *."

it is necessary to trace the history of emergency assistance in Illinois after that decision became final.

At the November 17, 1975, meeting of the Illinois Legislative Advisory Committee on Public Aid, defendant Trainor submitted the recommendation dated October 30, 1975, of his Department to "Eliminate [42 U.S.C.] 606(e) Program and Create a Program for Meeting Emergent Burnout Cases to be Funded Under Section 602 and Section 603." After consideration of the Department's proposal, the Committee endorsed the Department's recommendations and requested that the Department report back to the Committee "at its April 1976 meeting with the results of this program and [its] recommendations to handle other special emergency needs which may not have been met."

In its October 30 position paper, the Department indicated that "[e]liminat[ion] [of] the 606(e) Emergency Assistance Program" was out of the question:

> The Department, although believing this [eliminating] alternative to be legally acceptable, finds this alternative totally unacceptable. The Department believes that certain Emergency conditions, such as homelessness through burn outs are needs which the Department of Public Aid clearly ought to meet and the Department would not wish to curtail its ability to do so.

"[O]fficial notification to the Department of Health, Education, and Welfare that Ilinois shall not request reimbursement pursuant to § 406(e) of the Social Security Act (42 U.S.C. § 606(e)) for any expenses incurred after November 21, 1975, as the Department is terminating its program for 'Emergency Assistance to Needy Families with Children' existing pursuant

to said § 406(e)" was given by the Department of Public Aid in a November 21, 1975, letter to HEW.

On April 23, 1976, the state defendants submitted a plan to HEW (Joint Appendix 21–132—21–140) that was consistent with this notification of November 21. The April 23 plan, discussed *infra*, is the one now in effect.

On April 26, 1976, before another meeting of the Legislative Advisory Committee on Public Aid, Trainor indicated that the Department would assent to a broader emergency assistance program to alleviate destitution:

> After July 1, 1976, the program would be on a six-month trial basis. It would broaden the emergency needs to include persons to whom destitution exists or to whom destitution is threatened, and remedy any cause of destitution (Tr. at 40).

On May 3, 1976, in a report to the Court, defendants averred that the:

> Department will in all probability choose to apply for funding pursuant to § 406(e) of the Social Security Act (42 U.S.C. § 606(e) *et seq.*), when it has completed designing such an emergency assistance program and will submit the necessary State plan amendments to the Department of Health, Education and Welfare.

In the same report, defendants stated they were not "presently claiming any funds under § 606(e)."

In a May 12 report to the Court, defendants submitted a proposed plan which laid out eligibility requirements at least colorably consistent with Section 406(e)(1). At a May 17, 1976, meeting of the Legislative Advisory Committee, Representative Mann indi-

cated that the implementation date of the broadened plan would be advanced from July 1, 1976, to April 1, 1976.

On May 19, 1976, HEW filed its comments on the May 12 plan. Acknowledging that the new plan "differs radically from the old emergency assistance program," HEW noted:

> It is the Secretary's understanding that the plan description is merely a report to the Court concerning the present state of the Director's thinking concerning a new Illinois emergency assistance program. *When and if, that thinking crystalizes and is embodied in a completed plan, that plan will be submitted to the Secretary for approval. Until that time, the Secretary can have no formal views on the acceptability of any plan that the director may be considering.* [Italics supplied.]

Because of the broadened eligibility requirements, the plaintiffs believed that the "objections to the earlier plan [they] intended to file on May 19, 1976 [might] be unnecessary either in whole or in part," although the plaintiffs reserved the right to file objections to the amended plan.

On June 14, the Legislative Advisory Committee approved a plan with the following eligibility requirements:

> Recipients of AFDC, AABD, GA (in units administered by the Department) and persons who could be found presumptively eligible for such programs, including any needy child under 21 and the specified relatives with whom he is living. An additional condition of eligibility is that the persons must be destitute or immediately threatened with destitution.

This plan, by its own terms, sought reimbursement, at least in part, pursuant to Section 406(e).

On June 16, 1976, the plaintiffs were served with a June 15 notice of filing in the district court of the same liberalized Emergency Assistance Program, "which in part will employ § 406(e) emergency assistance funds," that the Legislative Advisory Committee had approved on June 14. Curiously, on June 17, 1976, counsel for the State informed the plaintiffs that he had been ordered not to file the new plan. The next day, the State filed a report of status which averred that the State would not "formulate or implement any Emergency Assistance Program which in part or in whole employs federal funds pursuant to Section 406(e) of the Social Security Act." Perhaps counsel for the State was inadvertently confirming the classic Shakespearean lesson on semantics: "What's in a name? That which we call a rose by any other name would smell as sweet." (*Romeo and Juliet*, Act II, Scene ii.) At any rate, that June 15 plan was never filed in court.

The plan submitted to HEW on April 23, 1976 (Joint Appendix 21–132–21–140) was virtually the same plan as that declared illegal in *Maudley I*. Even in its brief here, Illinois lists only two minor changes in the plan submitted to HEW, neither of which has any relevancy to broadened eligibility requirements.[3] The liberal plan worked out between the April 26 and June 14 Legislative Advisory Committee hearings which HEW felt "radically different" from the pre-*Maudley I* plan has never been submitted to HEW as far as can be determined from the opaque record before us.

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[3] See note 6 *infra*.

Rather the plan submitted to the regional office of HEW on April 23, 1976, was a program with eligibility requirements which were identical in all material particulars to the pre-*Mandley I* program. Thus on July 12, 1976, when the district judge declared the case moot, the only change with respect to the Illinois Emergency Assistance Program funded by HEW was that the source of funding had been switched from Section 403(a)(5) to Section 403(a)(1). Most importantly for our purposes, the scope of the program's elgibility requirements was identical to that of the eligibility requirements declared illegal in the pre-*Mandley I* plan.

The end result is succinctly detailed in a June 1, 1976, colloquy between the district judge and plaintiffs' counsel:

> The Court: But I don't think, as I get it, nobody is being deprived emergency assistance, although they may not get it under Section 606 (a) [sic, 606(e)]
>
> Mr. Lefkow: That is not correct, your Honor. Many, many people are being deprived of emergency assistance. (Tr. at 8)

DISMISSAL OF ACTION

On December 9, 1975, the defendant Secretary of Health, Education and Welfare filed a motion to dismiss on the ground of mootness. The state and federal motions to dismiss were answered by plaintiffs and denied by Judge McMillen on December 31, 1975, and he ordered the defendants to file objections to the plaintiffs' proposed final judgment and decree within three weeks. Such objections were filed by the state defendants on January 21, 1976, and by HEW on the

following day but never ruled upon.[4] Instead, after plaintiffs declined to amend their complaint further, the district judge dismissed the cause for mootness and for lack of case or controversy on July 12, 1976. This appeal followed. We reverse.

STRUCTURE OF SUBCHAPTER IV OF THE SOCIAL SECURITY ACT AS IT RELATES TO FUNDING OF AID PROGRAMS

In order to appreciate the funding of "emergency assistance" programs, it is necessary to outline briefly the structure of Subchapter IV funding. Section 401 authorizes the Congress to appropriate for each fiscal year a sum sufficient to carry out the general purposes of Part A of Subchapter IV—Aid to Families with Dependent Children. The sums so appropriated are made available to states which have submitted AFDC plans. Only states whose plans have been approved by the Secretary of Health, Education and Welfare may receive federal funds. The criteria for approval and the mechanics of approval are set forth in Section 402.

Once a State AFDC plan has been approved, Section 403(a) directs the Secretary of the Treasury to pay funds to the state from the funds appropriated under the authority of Section 401. Subsections (1)–(5) of Section 403(a) describe the various formulae used to calculate the actual dollar amounts to be paid. Since Section 403(a) actually directs the payment of funds, it is the section of Part A which should be referred to as the "funding" provision of Part A. Section

[4] In order to force a district court decision so that they would then have a final order for purposes of appeal to this Court, plaintiffs asked us in March 1976 to mandamus the district court to decide whether or not to enter the plaintiffs' final judgment. We denied plaintiffs' petition for mandamus on March 31, 1976.

403(a)(5) provides that the Secretary of the Treasury shall pay 50 per cent of a state's expenditures for "emergency assistance" to needy families with children. It is the only part of Section 403(a) dealing with "emergency assistance."

THE DEFENDANTS' FRAMING OF THE MOOTNESS ISSUE

At the time of *Mandley I* the state defendants were receiving emergency assistance funds under Section 403(a)(5). These funds were expended under the State's plan as "emergency assistance to needy families with children" as defined by Section 406(e)(1).

We are now advised that Illinois has ceased receiving funds pursuant to Section 403(a)(5) with the attached "strings" of Section 406(e)(1). Instead the State is receiving federal funds for emergency assistance under its regular AFDC plan pursuant to Section 403(a)(1). Since Section 403(a)(1) does not on its face include the term "emergency assistance to needy families with children," the State argues that the funds expended under Section 403(a)(1) no longer come with the attached "strings" of Section 406(e)(1). Defendants argue that the mandatory application of Section 406(e)(1) eligibility standards to the states announced in *Mandley I* occurs only if federal funding is received pursuant to Section 403(a)(5). Their argument concludes that since funding is now received only under Section 403(a)(1), the case is moot. Plaintiffs counter by alleging a circumvention of *Mandley I* by this change in funding.

SCOPE OF THE PRESENT CONTROVERSY

As a threshold matter, we must consider whether the plaintiffs' pleadings are broad enough to permit us to decide whether the defendants' change of fund-

ing is an artifice to avoid the *Mandley I* mandate. The amended complaint is an action brought to secure rights established by Section 406(e)(1) of the Social Security Act. Those are the rights that plaintiffs still seek to vindicate. The developments that took place after *Mandley I* were covered by the federal and state defendants' motions to dismiss, the plaintiffs' answer thereto, and the supporting documents filed by the respective parties. The very issue now before us was thus submitted and before the district court without the need of further amendments to the complaint.

This case is not moot, for the state defendants are still operating an emergency assistance program with matching federal funds, although under the guise of a "special assistance" program.[5] There is a live case or controversy because plaintiffs maintain that the state defendants must still comply with the standards of Section 406(e)(1) as long as federal funding is used for this program, while the state and federal defendants remain juxtaposed against plaintiffs.

WHETHER SECTION 406(E)(1) "STRINGS" ATTACH TO EMERGENCY ASSISTANCE REGARDLESS OF FUNDING

The Effect of Section 1318. Before reaching the ultimate issue—whether Section 406(e)(1) "strings"

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[5] Since we answer the issue of mootness at this fundamental level, we need not pass on the plaintiffs' answer to the defendants' motions to dismiss on grounds of mootness wherein they allege that "defendants intend by a technical maneuver to suspend temporarily requesting funds under § 406(e), to persuade this [district] court to dismiss the case as moot based on that suspension, and once the case is dismissed to return to § 406(e) funding without any prohibitions, injunctive or otherwise, from this [district] court." (Plaintiff's Memorandum in Opposition to Motions to Dismiss, December 17, 1975, at 5).

attach to emergency assistance regardless of funding—we must verify whether the present funding actually occurs under Section 403(a)(1). This is because HEW has recently informed us that the federal funding is solely under 42 U.S.C. § 1318. Section 1318 provides in pertinent part:

> In the case of any State which has in effect a plan approved under subchapter XIX of this chapter for any calendar quarter, the total of the payments to which such State is entitled for such quarter, and for each succeeding quarter in the same fiscal year (which for purposes of this section means the 4 calendar quarters ending with June 30), under paragraphs (1) and (2) of section * * * 603(a), * * * of this title shall, at the option of the State, be determined by application of the Federal medical assistance percentage (as defined in section 1396d of this title), instead of the percentages provided under * * * such section, to the expenditures under its State plans approved under * * * part A of subchapter IV of this chapter, which would be included in determining the amounts of the Federal payments to which such State is entitled under such section, but without regard to any maximum on the dollar amounts per recipient which may be counted under section.

This provision as it relates to Section 603(a) (Section 403(a) of the Social Security Act) was added in 1968 by the Social Security Amendments of 1967. 1 U.S. Code Cong. & Admin. News 1042 (1967). The 1965 provision it amended was itself put in the Social Security Act merely to:

> permit any State which has in effect a plan approved under the new title XIX [Medicaid] to claim Federal participation in its expenditures

> under all of its Federal-State public assistance programs by application of the new formula contained in title XIX instead of using the varying formulas in the existing titles. 1 U.S. Code Cong. & Admin. News 2265 (1965).

Indeed Section 1318, by its own terms, acknowledges that the entitlement for funding payments is still provided under Section 603(a) (Section 403(a) of the Social Security Act). Thus the interaction between Sections 603(a) and 1318 preserves the former's status as the funding provision with the effect of the latter here to maintain the same 50 per cent federal and 50 per cent state rate of funding that exists for emergency assistance to needy children under Section 403(a)(5) of the Act. At any rate, even if the funding were now solely under Section 1318, HEW states that "does not materially change the argument of the appellee [HEW]" (Nov. 1, 1976, HEW motion to correct its brief). The state defendants have not mentioned Section 1318 orally or on brief, evidently also realizing it does not change their position. As with emergency assistance funding under Section 403(a)(5), Illinois receives a 50 per cent federal share for its AFDC program under Section 1318 alone or in combination with Section 403(a)(1).

The Ultimate Issue. The state defendants admit that they are conducting the same program under the label "special assistance" that they formerly conducted under the label of emergency assistance, with minor exceptions.* Illinois contends that the service it form-

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* At HEW's suggestion, effective October 12, 1976, the state defendants removed the restriction limiting special assistance payments to once in any 12 consecutive months. Simultaneously, they no longer authorized the payment of moving costs as a result of court-ordered eviction. AFDC Manual, Release No. 76.46 (October 12, 1976), amending Manual Chapter 600.

erly gave under Section 406(e)(1) as emergency assistance to needy families with children is now given under Section 402 as part of aid to needy families with children. Instead of seeking federal funding for the program under Section 403(a)(5) authorizing the Secretary of the Treasury to pay 50 per cent of the total amount expended by a state under its plan for emergency assistance to needy families with children, the state defendants assert that they now obtain federal funding under Section 403(a)(1) providing that the Secretary of the Treasury pay each state which has an approved AFDC plan certain amounts as computed thereunder. We hold that the Illinois defendants cannot avoid the eligibility requirements of Section 406(e)(1) by relabeling the plan as part of AFDC under Section 402 while still receiving 50 per cent federal funding for what is really Section 406(e)(1) emergency assistance to children.

Stripped to the bone, our holding is founded on the premise that Section 403(a)(5) is the exclusive provision for federal funding of emergency needs under Part A of Subchapter IV. Section 406(e)(1), edited for present purposes, provides:

> The term "emergency assistance to needy families with children" means any of the following [furnished during a defined time period to people meeting defined eligibility standards]—
>
> (A) money payments, payments in kind, or such other payment as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household on which he is living, and
>
> (B) such services as may be specified by the Secretary;

> *but only with respect to a State whose State plan approved under Section 602* [*Section 402 of Social Security Act*] *of this title includes provision for such* [*emergency*] *assistance.* [Italics supplied.]

Clearly the State has the option of whether or not to include a provision in its state plan in order to receive federal funding under Section 403(a)(5) for Section 406(e)(1) emergency assistance. The legislative history of Section 406(e) reinforces this reading of the statute. As the Senate Finance Committee's report stated:

> a new program optional with the States would authorize dollar-for-dollar Federal matching to provide temporary assistance to meet the great variety of situations faced by needy children in families with emergencies. 2 U.S. Code Cong. & Admin. News 2838 (1967).

But the fact that a State has the option of whether or not to claim federal funding under Section 403(a)(5) for Section 406(e)(1) emergency assistance is totally distinct from the question of whether a state has the option to choose whether to receive federal funding for emergency needs under Section 403(a)(5) or 403(a)(1). We conclude the state does not enjoy such an option.

HEW's principal argument is that Section 403(a)(5) merely provides an additional source of monies for state emergency assistance plans. The total amount of funds appropriated in a given year for AFDC by the Congress is allocated according to the applicable formula in Section 403(a)(1). In any given year, the Section 403(a)(1) formula would determine a fixed dollar amount. Thus to the extent that federal funding for a "special assistance" pro-

gram is sought from the total amount of monies in a year allocated to fund Section 403(a)(1) AFDC, programs, these other programs presumably would be reciprocally limited. Since Section 403(a)(5) draws on a different block of the funds appropriated for emergency assistance in any given year, a similar limiting tension would not exist on state emergency programs funded under Section 403(a)(5). In this sense, Section 403(a)(5) funding is "additional." But by underscoring these funding subtleties, HEW has shown why Section 403(a)(5) should be construed as the exclusive funding provision for emergency assistance. The 1967 amendments were introduced to correct the unsatisfactory delivery of state emergency assistance. Those amendments would be undermined if HEW's construction were permitted to create this limiting tension on Section 403(a)(1) AFDC funds while the Section 403(a)(5) block of funds appropriated by Congress for emergency assistance in a given fiscal year lies unused.

When Congress added to the emergency aid for children provisions to the Social Security Act in 1967, Senator Curtis explained them on the floor of the Senate (113 Cong. Rec. 36319 (1967)):

> Now, Mr. President, I should like to refer to another new provision in this measure. *For the first time, the Federal Government will match money for emergency assistance. This has not been in the law before.* For a period of 30 days, emergency assistance can be paid in cases where they cannot meet other qualifications. Many of the States have asked for this provision, and it is one that should be looked at by those who say they will reject this bill because it is not liberal. It would do many of the things

> for which States, welfare directors, and others have been asking for a long time. [Italics supplied.]

Speaking directly after the acceptance of the Conference Report by the Senate, Senator Mansfield indicated the 1967 amendments' scope as follows (113 Cong. Rec. 36925 (1967)):

> Families with emergency trouble will be able to receive emergency assistance in whatever form it is best for them at their time of need. Families which have been burned out, suffered personal tragedies and such will be able to get money, medical care, shelter provided, food sent in, or whatever else is needed to deal with the crisis. The committees are to be commended for adding this provision, thus recognizing that emergencies which strike families cannot be dealt with by business-as-usual methods.
>
> Sometimes emergencies which strike families reveal deep-seated problems which establish that the children are in danger of exploitation or abuse. Under the legislation, States are required to have, in advance, plans to deal with these situations. This means working closely with the courts and being prepared, when necessary, to find places for children removed from the home by the courts. For these children, previous provisions have been inadequate. Under the new legislation, the financing will be sufficient to assure that the child may be placed in a safe place with the Federal Government paying its share of the cost.

The tenor of these remarks shows the importance of the program and that participating states would have to provide a plan approved by HEW. Emergency assistance was meant to supplement normal

AFDC payments. As the Senate Finance Committee reported:

> The Committee understands that the process of determining AFDC eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs. In the event of eviction, or when utilities are cut-off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today. (2 U.S. Code Cong. & Admin. News 3002 (1967)).

The federal regulations require that "emergency assistance will be given forthwith" (45 C.F.R. Section 233.120(a)(5)), but Congress provided in Section 406(e)(1) that emergency assistance should be furnished only once in any 12-month period. It is thus apparent that regular AFDC public assistance was administratively and congressionally distinguished from emergency assistance, which is a one-time grant to "avoid destitution" (Section 406(e)(1)). As we held in *Mandley I,* relying in part on additional legislative history, Congress intended the eligibility provisions of Section 406(e)(1) to be mandatory on states giving emergency assistance. 523 F. 2d at 420–423. To like effect, see *Williams* v. *Wohlgemuth,* 540 F. 2d 163 (3d Cir. 1976); Note, Meeting Short-Term Needs of Poor Families: Emergency Assistance for Needy Families with Children, 60 Corn. L. Rev. 879, 886–891 (1975) (hereinafter cited as Cornell Note). In our view, the synergistic sum of all these factors results in the conclusion that Congress intended Section 403(a)(5) to be the exclusive source of federal funding in Part A of Subchapter IV of the Social

Security Act for the Section 406(e) emergency assistance needs of the citizens of the states.

Illinois cannot evade the Section 406(e)(1) eligibility requirements by relabeling its emergency assistance program as AFDC "special assistance" while still obtaining matching funds from the federal government. See *Youakim* v. *Miller,* 425 U.S. 231, 96 S. Ct. 1399, 47 L. Ed. 2d 701.[7] If that were permissible by a mere change in nomenclature, the requirements of Section 406(e)(1) would be totally eviscerated.[8] Therefore, if Illinois continues to accept federal funds for its "special assistance" program, the guidelines established by Congress in Section 406(e)(1) must be met (*Williams* v. *Wohlgemuth, supra,* at 170 n.37; *Lynch* v. *Philbrook,* —— F. Supp. ——, —— (D.Vt. 1976)), and HEW must continue to provide half the funding under Section 403(a)(5), as it formerly did with respect to Illinois.

We may take note that state funds available for expenditure on welfare programs are tightly limited. The Senate Finance Committee's report shows that through emergency assistance Congress meant "[t]o

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[7] In discussing *Youakim*, HEW has recognized that for a foster care plan to be funded under Section 403(a)(1) or 1318, it must meet the inclusion requirements in Section 408 (Br. 11). Similarly here, even if an emergency assistance plan (by whatever name) is funded under Section 403(a)(1) or 1318, it must meet the eligibility requirements of Section 406(e)(1). In the words of another metaphor of the same genus, whatever Illinois presently dubs its emergency assistance plan, "a rose is a rose is a rose."

[8] The *amici curiae*, various private charities, state in their brief that if this were "successful, [Illinois] would make permanent the transfer of the burden of providing for most emergencies to the private social welfare organizations in violation of the basic principles of both federal and state welfare policy."

encourage public welfare agencies to move promptly and with maximum effectiveness in [emergency situations]." 2 U.S. Code Cong. & Admin. News 3003 (1967). Congressman Mills noted in the debates that with emergency assistance, the House believed "that encouraging the States to move quickly in family crises, supplying the family promptly with appropriate services, would in many cases preclude the necessity for family having to go on [AFDC] assistance on a more or less permanent basis." 113 Cong. Rec. 23054 (1967). Funding with Section 406(e)(1) eligibility requirements for emergency assistance requires the states to meet the needs of a broader class of individuals. Cornell Note, *supra,* at 883, 884. The total state share, assuming maintenance of the present level of benefits,[9] for funding emergency needs when the federal matching share comes under Section 403(a)(5) would normally be larger than if the federal funding comes under AFDC Section 403(a)(1) (whether singly or in conjunction with Section 1318), a provision ostensibly free of the Section 406(e)(1) eligibility requirements. Congress would be thwarted in its aim to encourage the provision of emergency relief to those children who it intended as targets if a state had the choice of claiming emergency assistance funds under Section 403(a)(1) for AFDC without the "strings" of Section 406(e)(1).

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[9] Of course, the level of state benefits does not have to remain constant. As we said in *Mandley I:* "Because Illinois has accepted federal funds to operate an emergency assistance program, it is bound by the eligibility provisions of 42 U.S.C. § 606(e). This need not result in additional expense to the state but with existing appropriations should at least result in helping a broader number of persons, although more moderately than at present." 523 F. 2d at 423.

RELIEF

This case concerns emergency needs of people in dire straits. Yet over three years have pased since the filing of the complaint and over one year has gone by since the return of our mandate in *Mandley I*. Therefore, we now consider *sua sponte* the objections of the defendants to the merits of plaintiffs' proposed final judgment of November 26, 1975. Cf. *Hartford-Empire Co.* v. *United States,* 323 U.S. 386, 410–435, 65 S. Ct. 373, 89 L. Ed. 322.

The state defendants object principally on the grounds that Section "406(e) funding" is no longer utilized by Illinois. For the reasons stated above, we cannot sustain this line of objection.[10] Lest Illinois

[10] The state defendants also apparently maintain that *Purnell* v. *Edelman*, 511 F. 2d 1248 (7th Cir. 1974), is a form of *stare decisis* upon our decision here. In the words of defendants' objection: "That case presented a problem to the Trial Court on remand identical to the instant situation. In *Purnell*, the Illinois Department of Public Aid chose to cease its participation in the same 406(e) Emergency Assistance program of utility service 'turnons' and instead adopted a different mode of handling the problem which did not use § 406(e) funds. Plaintiffs, on remand to the Court below, sought a Rule to Show Cause why the Defendants should not be held in contempt of Court. Upon being satisfied that the state was no longer claiming funds under the 406(e) Emergency Assistance program, *plaintiffs withdrew their motion for a rule.* In that case withdrawal from the 406(e) program was sufficient to moot the controversy." [Italics supplied.] The answer to this objection is immediate. In *Purnell*, the plaintiffs withdrew their own motion on the propriety of the State's funding of emergency assistance with federal funds not subject to Section 406(e) eligibility standards, thereby voluntarily mooting the case. But in *Mandley II* the plaintiffs, far from voluntarily mooting their own case, are vigorously pursuing an attack on the validity of the state's emergency assistance program.

mistakenly understand this opinion to strip it of control over the implementation of its emergency assistance program, we hereby reaffirm our observations in *Mandley I:*

> Illinois, should it elect to continue to provide an emergency assistance program in the future, will still have substantial control of its program. It will be able to choose the level of benefits that it will provide and to set the standard of need. It may reasonably limit the amounts paid out in emergency assistance, *Dandridge* v. *Williams,* 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491, but it will not be able to declare ineligible those who come within the federal definition of eligibility in Section 606(e). This Court need not establish the exact meaning of the eligibility provisions of Section 606 (e) because this case requires only that the validity of the specific Illinois program be determined. The problem of setting workable definitions for the somewhat amorphous eligibility criteria in Section 606(e) may be addressed by HEW rule-making. Such rule-making should aid the states in preparing programs that are in accord with the eligibility criteria set by Congress. 523 F. 2d at 422–423.

Part of the proposed final judgment orders HEW to file a proposed regulation with district court to conform to our opinion. HEW contends that a federal district court has "no authority to order the performance of a discretionary act, such as the adoption of any particular regulation." But the duty of the Secretary to promulgate regulations implementing the provisions of the Social Security Act is a mandatory one. 42 U.S.C. § 1302. Implicit in HEW's objection is the notion that ordering the promulgation of regulations is an untoward invasion

of the province of the Secretary. This contention has been persuasively answered by the Second Circuit. In *Kingsbrook Jewish Medical Center* v *Richardson*, 486 F. 2d 663 (2d Cir. 1973),[11] the court reversed

> the order below and remand[ed] to the district court with instructions to grant Kingsbrook's motion for summary judgment, to the extent of directing the Secretary of Health, Education and Welfare to promulgate regulations consistent with the interpretation [42 U.S.C.] 1395x(v)(1) that we have announced. 486 F. 2d at 670.

In an explanatory footnote, the court observed that:

> Where there are no material issues of fact in dispute, an appellate court reviewing the dismissal of a complaint can, upon reversal, also remand with directions to grant summary judgment on appellant's previously denied cross-motion. Under the circumstances present here "we perceive no reason for not bringing this litigation to an end." *Stein* v. *Oshinsky*, 348 F. 2d 999, 1002, (2d Cir. 1965); 6 J. Moore, Federal Practices ¶ 56.13 at 2251–52 (2d ed. 1972).

Since the defendants did not object to the findings of fact in the plaintiffs' final judgment, we can perceive no reason not to bring the instant case "to an end."

Paragraph B–1 of the proposed final judgment purports to order the Secretary to include some specific items in the regulation, viz. "definitions of such terms as 'necessary to avoid destitution' and 'lack of avail-

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[11] Professor Davis has approvingly characterized this case as an instance of a court being "guided by [its] usual common sense." K. Davis, Administrative Law of the Seventies, § 23.09 at 545 (1976).

able resources' which are compatible with providing emergency assistance when a needy child is approaching destitution." While it would be salutary to include such definitions in the new regulation and while the Secretary might find it necessary as a matter of administrative practicality to include them, we will not order HEW specifically to include any items in its new regulation.[12] Of course, whatever regulations the Secretary issues must be consistent with today's opinion and *Mandley I*.

We have considered the defendants' other objections to the proposed judgment and find them without merit. Because there has been no compliance with our previous mandate for more than a year, we direct the district court to enter plaintiffs' proposed judgment forthwith except with respect to the definitional aspect of Paragraph B–1. In addition, finding of fact 7 should be deleted as obsolete, and Paragraph A–1(c) must be modified in accord with note 12. A fresh mandate will issue and be returned to the district court this day.

Judgment reversed and remanded for further proceedings consistent herewith.

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[12] Because of this change, Paragraph A–1(c) of the final judgment is modified to commence "Until HEW files regulations under Paragraph B–1 below,".

APPENDIX B

United States District Court, Northern District of Illinois Eastern Division

No. 73 C2453

MANDLEY *v.* TRAINOR

July 12, 1976

THOMAS R. MCMILLEN, Presiding Judge.

Defendant's motion to dismiss for mootness is granted, and this cause is dismissed for lack of case or controversy.

APPENDIX C

United States Court of Appeals for the Seventh Circuit

Nos. 75–1083, 75–1245

VENUS MANDLEY ET AL., PLAINTIFFS-APPELLANTS

v.

JAMES L. TRAINOR ET AL., DEFENDANTS-APPELLEES

Argued June 6, 1975—Decided Sept. 25, 1975

Before MOORE,* Senior Circuit Judge, CUMMINGS and BAUER, Circuit Judges

CUMMINGS, Circuit Judge.

This class action was brought by Illinois recipients of the Aid to Families with Dependent Children (AFDC) program and the Illinois and Chicago Welfare Rights Organizations against the Illinois Department of Public Aid (the Department), its director and the United States Department of Health, Education and Welfare (HEW). Plaintiffs alleged that the Department's revised program for emergency assistance to AFDC recipients violated Section 406(e) of the Social Security Act (42 U.S.C. § 606(e)), regulations promulgated thereunder by HEW, the Equal Protection Clause of the Fourteenth Amendment, and the Illinois Public Aid Code (Ill. Rev. Stats. ch. 23,

*Senior Circuit Judge Leonard Page Moore of the Second Circuit is sitting by designation.

§ 12–8 (1973)). Plaintiffs sought declaratory and injunctive relief against the implementation and operation of the program and an injunction requiring expedited processing and delivery of emergency assistance to those eligible to receive it.

After a bench trial, the district court rendered a decision holding that the Illinois program for emergency assistance conforms to the requirements of federal and state law, except that the processing was too slow. Jurisdiction was refused with respect to the pendent state claim that the Illinois program violates the Illnois Public Aid Code. However, the State defendants were ordered to show cause with respect to expediting emergency assistance.

In its second memorandum opinion, the district court ordered the State defendants to show cause why emergency assistance checks could not be written in Chicago or in a district office other than Springfield, Illinois, or why some other method of payment could not be devised to eliminate delays from unnecessary Springfield mailings.

The district court's final decision was entered on March 14, 1975. This order specified the steps to be taken by the Department to speed up the delivery of assistance in Cook County. However, in practical effect the order did not require the state defendants to furnish emergency assistance in the 101 other Illinois counties by any means other than mailing from Springfield.

Plaintiffs appealed from the original and final orders of the district court insofar as they denied plaintiffs the requested relief. We find the Illinois emergency assistance scheme to be in conflict with the Social Security Act and therefore invalid by virtue of the Supremacy Clause of the Constitution. Accord-

ingly, we reverse that portion of the district court's order that is to the contrary.[1]

In 1935, Congress enacted the AFDC program as Title IV-A of the Social Security Act. Provision for the economic security of children was made by offering substantial federal funds to states submitting plans complying with the Act and HEW regulations. In 1968, Congress enacted an emergency assistance program to enable states to meet the immediate needs of children. The present dispute concerns the mandatory scope of the program under the federal statute once a state decides to include emergency assistance in its plan.

The key provision of the Social Security Act with respect to emergency assistance to needy children is contained in 42 U.S.C. § 606(e) (Section 406(e) of the Act) which provides:

> (1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without

[1] Such reversal was also sought by various charities that filed a brief *amici curiae*.

good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary;

but only with respect to a State whose State plan approved under section 602 of this title [section 402 of the Act] includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

In summary, this statute authorizes emergency assistance to a needy child under 21, living with relatives specified in 42 U.S.C. § 606(a), who is without available resources, if the assistance is necessary to avoid destitution or to provide living arrangements in a home, and if the need did not arise because such child or relatives refused without good cause to accept training or employment.

Under the March 1971 Illinois emergency assistance plan, its first election of the reimbursement of provisions in 42 U.S.C. § 606(c), eligibility was limited to AFDC recipients and confined to the following needs:

§ 6510 EMERGENCY ASSISTANCE PROVISIONS: ACTIVE AFDC ONLY

(*a*) Paying delinquent rent or property payments allowed in lieu of rent to prevent eviction;

(b) Paying delinquent utilities bills to restore discontinued service; and

(c) Meeting immediate, emergent needs for other items of basic need included in the Standards of Assistance.

Moving costs were later added, and needy families not eligible for AFDC were excluded unless their needs resulted from civil disorders.

Subsequently HEW suggested that Illinois should be more specific in the listing of the emergencies it did compensate. Therefore, on October 1, 1973, the Department revised its program and limited assistance to situations where an "emergent need" existed. The payments were still restricted to those eligible for AFDC and further restricted by the definition of "emergent need":

> An "emergent need" exists when one of the following crisis situations occurs:
>
> 1. The AFDC family is homeless (without shelter) as a result of damage to the building rendering it uninhabitable (example: fire, condemnation).
>
> 2. A court-ordered eviction occurs for reasons other than the recipient's failure to pay rent.
>
> 3. The AFDC family is potentially homeless due to damage to a portion of the building.
>
> 4. The AFDC applicant, determined presumptively eligible for AFDC, is in emergent need of clothing and/or household furnishings and equipment.
>
> (Ch. 6500 of the Categorical Assistance Manual of the Department.)

Since the eligibility provisions were severely restricted in the October 1973 revisions in the program, the Department has provided only about one-fifth of

the total dollar aid provided to needy families under the prior program.

Plaintiffs challenge the Illinois program for administering reimbursable emergency assistance under 45 U.S.C. § 606(e), Section 406(e) of the Social Security Act, as invalid for both constitutional and non-constitutional reasons. In accord with the time-honored practice of avoiding constitutional questions where a non-constitutional ground exists for resolving the case, this Court deals first with plaintiffs' statutory argument.[2]

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[2] Plaintiffs plead federal question jurisdiction, which requires that more than $10,000 exclusive of interest and costs be in controversy. 28 U.S.C. § 1331. The complaint asserts that such an amount is in controversy and defendants do not complain that jurisdiction has been improperly exercised by the district court. This Court must assure itself that the district court had jurisdiction, regardless of the positions taken by the parties, because federal courts are courts of limited jurisdiction.

Assuming without deciding that the plaintiffs cannot properly show $10,000 as to each member of the class because of the 30-day per year restriction on emergency (*Baxter* v. *Minter*, 378 F. Supp. 1213, 1216–1217 (D. Mass. 1974)), there is no § 1331 jurisdiction. See generally Note, Federal Judicial Review of State Welfare Practices, 67 Colum.L.Rev. 84 (1967). Since plaintiffs here allege Civil Rights Act jurisdiction through 42 U.S.C. § 1983 and 28 U.S.C. § 1343, and since the claim is not insubstantial, the statutory claims against the state defendants, at least, may be taken pendently. See *Philbrook* v. *Glodgett*, 421 U.S. 707, 95 S. Ct. 1893, 44 L. Ed 2d 525, Jurisdiction over the federal defendant is unavailable under the Civil Rights Act, so that the assertion of pendent jurisdiction over it is a complex and difficult jurisdictional question. See *Philbrook*, *supra*, at 720–722,95 S. Ct. 1893.

However, since the plaintiffs also allege jurisdiction under 28 U.S.C. § 1361, and since this Court concludes *infra* that Section 606(e) does set forth mandatory eligibility standards in the absence of clear intent to the contrary in the federal statute or its history, mandamus jurisdiction will lie with respect to the federal defendant. Thus this Court need not reach the difficult pendent jurisdic-

VALIDITY OF ILLINOIS EMERGENCY ASSISTANCE PLAN

Plaintiffs first argue that defendants' program unlawfully excludes persons made elegible by the emergency assistance provisions of the Social Security Act. Plaintiffs claim that the Illinois program has unlawfully established eligibility standards narrower than those in 42 U.S.C. § 606(e) because that program provides assistance only to persons whose emergency needs fall within four limited types of crisis situations and provides no emergency assistance for families who are not applicants for or recipients of AFDC. Thus needy families who are in danger of destitution within the meaning of 42 U.S.C. § 606(e), but who are not otherwise eligible for AFDC or whose destitution came about in a manner not enumerated in Chapter 6500 of the Department's Manual, are denied emergency assistance. Plaintiffs rely especially on *Carleson* v. *Remillard,* 406 U.S. 598, 92 S. Ct. 1932, 32 L. Ed. 2d 352; *Townsend* v. *Swank,* 404 U.S. 282, 92 S. Ct. 502, 30 L. Ed. 2d 448; *Lewis* v. *Martin,* 397 U.S. 552, 90 S. Ct. 1282, 25 L. Ed. 2d 561; and *King* v. *Smith,* 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118.[3] Those

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tional question. In holding Section 1361 applicable here, we are mindful of the criteria set out in *City of Highland Park* v. *Train,* 519 F. 2d 681 at 691 (7th Cir. 1975, and modified July 24, 1975), for exercising mandamus jurisdiction. These criteria are satisfied in this case.

Since HEW would be practically bound by our decision, even if it were technically handed down only with respect to the state defendants, we assume that HEW would move to intervene on remand even if we had dismissed it in this Court. See *Philbrook, supra,* at 720–722, 95 S. Ct. 1893.

[3] See also *Van Lare* v. *Hurley,* 421 U.S. 338, 95 S. Ct. 1741, 44 L. Ed. 2d 208; *Philbrook* v. *Glodgett,* 421 U.S. 707, 95 S. Ct. 1893, 44 L. Ed. 2d 525; *Burns* v. *Alcala,* 420 U.S. 575, 95 S. Ct. 1180, 43 L. Ed. 2d 469; and *Lascaris* v. *Shirley,* 420 U.S. 730, 95 S. Ct. 1190, 43 L. Ed. 2d 583.

cases establish that a state program which restricts eligibility beyond what was intended by Congress is invalid for inconsistency with the Social Security Act. In *Townsend,* the Illinois defendants and HEW asserted that Congress authorized the states to vary eligibility requirements from federal standards. However, the Court held that once a state elected to extend benefits to 18–20 year-olds, it was required to include all those made eligible by 42 U.S.C. § 606(a)(2)(B), including college students. The other cases cited *supra* are similar. Each case involves a state's attempt to draw AFDC eligibility criteria more narrowly than the eligibility criteria set out in the Social Security Act and each attempt was rejected as invalid as contrary to the intent of Congress.

Section 406(e) of the Act extends coverage for emergency service to a family with a needy child under 21 living with any of the relatives specified in Section 406(a)(1), in a place of residence maintained by one or more of such relatives as his or their own home. However, Congress limited the reimbursement for emergency assistance for such a needy family to situations where the child is without available resources and assistance and the assistance is necessary to avoid destitution or to provide a living place in a home for such child, provided "such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment." In our view, all children who fall within this definition are made eligible for emergency assistance.

Section 406(e) specifically permits two areas of state discretion. Thus the state is permitted to furnish emergency assistance in the form of "money payments, payments in kind, or such other payments as

the State agency may specify." Also, Congress provided that a state may provide emergency aid to migrant farmworkers (presumably despite residency requirements in the state plans), and may select parts of the state in which to provide emergency assistance to migrant workers (presumably despite the mandate in 42 U.S.C. § 602(a)(1) that elected programs must be administered statewide).

The state defendants and, to a lesser degree, the federal defendant insist that the language of 42 U.S.C. § 606(e)(1) does not establish standards of eligibility at all, but merely defines the maximum limits of reimbursable emergency assistance. Thus in their view Section 606(e)(1) describes what is provided rather than who is covered. We reject this semantical argument. Similar arguments could have been made in *King, Townsend* and *Carleson* as to the eligibility provisions of the Social Security Act discussed there; yet the Supreme Court viewed the provisions as relating to eligibility. The provisions in Section 606(e)(1) discussed *supra* describe eligibility criteria for the emergency aid program. Thus the central issue in this case becomes whether Congress intended to allow the states to apply eligibility criteria that are narrower than those set out in Section 606(e)(1). If, as plaintiffs argue, Congress intended that any state which elected to participate in the emergency aid reimbursement program must provide aid to all those eligible under the provisions of Section 606(e)(1), the Illinois program is invalid since it more narrowly restricts the availability of emergency assistance. See the quotation from the Department's Categorical Assistance Manual, Ch. 6500, *supra* at 5, and the surrounding discussion. If, however, Congress intended to allow the states to adopt their own eligibility requirements, Il-

linois' program does not conflict with Section 606(e). Our task is to interpret the intent of Congress. In attempting to discern that intent, this Court is mindful that no special presumptions in favor of coverage are to be applied in interpreting provisions of the Social Security Act and that the normal tools of legislative interpretation are to be employed. *Burns* v. *Alcala*, 420 U.S. 575, 578, 95 S. Ct. 1180, 43 L. Ed. 2d 469.

As is often the case, the legislative history of 42 U.S.C. § 606(e) contains little information helpful as to Congressional intent on the crucial issue here. See Senate Report No. 744, 90th Cong., 1st Sess., 2 U.S. Code, Congressional & Admin. News, 2834, 3002–3004 (1967). Both sides in this case point to various portions of the legislative history for support of their positions but nothing cited is conclusive.

We deem it worthwhile to note that it is clear from the Senate Report on the bill that Congress intended that families who were not eligible for AFDC should be eligible, as far as the federal Government was concerned, for emergency aid under Section 606(e). *Idem* at 3003. While this does not answer the question whether Congress intended the states to have the right to narrow the eligibility under Section 606(e), it does indicate that Congress was concerned about a broader group of needy children than Illinois' program covers. Moreover, it appears that Congress was concerned with needy children who were approaching destitution from a variety of causes other than those recognized by Illinois. Thus the Senate Report states:

> The committee understands that the process of determining AFDC eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs. In the event of eviction or when utilities are turned

> off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today. When a child is suddenly deprived of his parents by their accidental death or when the agency finds that conditions at home are contrary to the child's welfare, new arrangements and court referrals may have to be made. (*Idem* at 3002.)

While the legislative history is not conclusive of Congress' intent, it does show that there is no specific indication that Congress intended the states to be able to narrow the eligibility criteria, that Congress was much concerned with the emergency needs of all children approaching destitution, whether or not they were AFDC eligible, and that Congress considered that there was need for aid to needy children who approached destitution due to reasons other than those recognized in the Illinois program. We also note that the general tenor of the legislative history shows great concern for those families with children who are in need of emergency aid.

Defendants rely on the HEW regulation that interprets Section 406(e) of the Act to allow the states to set the criteria for eligibility, 45 C.F.R. § 233.1200 (1974). Defendants claim that this interpretation of the agency charged with administering the program is entitled to great weight, especially in the absence of a clear legislative intent in the provision's history. See *New York Department of Social Services* v. *Dublino*, 413 U.S. 405, 421, 93 S. Ct. 2507, 37 L. Ed. 2d 688; *Udall* v. *Talman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L. Ed. 2d 616. However, another regulation promulgated by HEW after the *Townsend* decision is also relevant. 45 C.F.R. § 233.10(a)(1)(ii) applies to

the chapter of the Act containing Section 406(e) and provides in part:

> (ii) A State may:
> (A) Provide more limited public assistance coverage than that provided by the Act *only where the Social Security Act or its legislative history authorizes more limited coverage;* [italics added].

As has been seen, there is no clear indication in the legislation or its history indicating that Congress intended to allow the states to construct narrower eligibility requirements than those in the statute. Thus it is difficult to perceive the justification for HEW's promulgation of 45 C.F.R. § 233.120. This would not be the first time that HEW has sought discretion for the states that the courts have held was not intended by Congress to be given to them. In light of these factors we do not feel it proper to rely heavily on the administrative interpretation of Section 406(e). See also *Application of Bryant* v. *Lavine,* 79 Misc. 2d. 425, 359 N.Y.S. 2d 492 (Sup. Ct. 1974); *Application of Preston* v. *Barbaro,* 61 Misc. 2d 327, 305 N.Y.S. 2d 627 (Sup. Ct. 1969).

The Government notes that the *Carleson, Townsend, Burns* and *King* cases, *supra,* relied on 42 U.S.C. § 602(a)(10) which provides that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." Then the Government contends that this provision does not apply to 42 U.S.C. § 606(e) because "dependent child" is not used therein. We believe that Sections 602(a) and 606(e) cannot be so neatly and completely severed. Section 602 sets forth what state plans must provide in order to qualify for federal reimbursement. It also contains the hearing provisions (§ 602(a)(4)), the

"reasonable promptness" provisions (see *Adens* v. *Sailer*, 312 F. Supp. 923, 926 (E.D. Pa. 1970)), the state reporting provisions (§ 602(a)(6)), and others that must apply to Section 606(e) in any reasonable interpretation of the entire Act. It also appears that when Congress wished to make an exception to the generally applicable provisions of Section 602(a), it was able to do so clearly. Thus in Section 606(e)(2) Congress expressly noted that emergency assistance to migrate workers need not be statewide. This seems an apparent exception to Section 602(a)(1), requiring a state plan to be in effect in all political subdivisions of the state. The close relationship between Sections 602(a) and 606(e) leads us to believe that Congress intended that Section 606(e) be treated in the same way as Section 606(a), which also is closely related to Section 602, despite the inclusion in Section 602(a)(10) of the phrase "families with dependent children." The Supreme Court cases listed earlier in the opinion hold that Congress intended the eligibility requirements of Section 606(a) to be mandatory on the states. See, *e.g.*, *Burns, supra*, 420 U.S. at 578, 95 S.Ct. 1180; *Carleson, supra; Townsend, supra.* It therefore appears that Congress intended that the eligibility provisions of Section 606(e) be mandatory on the states, just as the courts have held with respect to the eligibility requirements of Section 606(a).

In summary, Section 606(e) is part of the same statutory scheme as Sections 606(a) and 602. The same Congressional concern with deprivation of children that brought forth the AFDC program was at the root of the emergency assistance program as well. Since the legislative history of the latter program demonstrates continuing Congressional concern with the nation's poor children and contains no indication

that its eligibility provisions are to be more in state control than its closely related sister program, we must follow the number of Supreme Court cases that have held that the eligibility provisions of the federal program cannot be narrowed by the states.

Illinois, should it elect to continue to provide an emergency assistance program in the future, will still have substantial control of its program. It will be able to choose the level of benefits that it will provide and to set the standard of need. It may reasonably limit the amounts paid out in emergency assistance, *Dandridge* v. *Williams,* 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491, but it will not be able to declare ineligible those who come within the federal definition of eligibility in Section 606(e). This Court need not establish the exact meaning of the eligibility provisions of Section 606(e) because this case requires only that the validity of the specific Illinois program be determined. The problem of setting workable definitions for the somewhat amorphous eligibility criteria in Section 606(e) may be addressed by HEW rule-making.[4] Such rule-making should aid the states in preparing programs that are in accord with the eligibility criteria set by Congress. Illinois may no longer

[4] Plaintiffs amended the conclusion of their main brief to request restitution for one of the named plaintiffs, Frances Gallman, who was allegedly eligible under the federal criteria when she was robbed of her monthly aid funds. Since we do not here decide the exact content of the emergency assistance program, but only hold that Illinois' present regulations are invalid, it would be inappropriate for us to decide whether Gallman was indeed eligible, particularly since HEW has not had an opportunity to make rules aiding the states and the courts in discerning the specific rules as to who is eligible. Accordingly, we decline to consider Gallman's request for restitution on this appeal.

conduct an emergency assistance program under Section 606(e) in which some of the families with needy children described in Section 606(e) are given aid and some are not. Because Illinois has accepted federal funds to operate an emergency asistance program, it is bound by the eligibility provisions of 42 U.S.C. § 606(e). This need not result in additional expense to the state but with existing appropriations should at least result in helping a broader number of persons, although more moderately than at present.

Since we hold that the Illinois emergency assistance program defines eligibility more narrowly than 42 U.S.C. § 606(e) and therefore is in violation of the Social Security Act, we need not consider whether the program violates the Equal Protection Clause of the Fourteenth Amendment or the Illinois Public Aid Code.

MAILING OF EMERGENCY ASSISTANCE CHECKS OUTSIDE COOK COUNTY

As noted, Section 402(a)(10) of the Act requires aid to be "furnished with reasonable promptness." Section 406(e) itself prescribes no time for delivery of emergency assistance, but a regulation of HEW requires that a state plan provide that "emergency assistance will be given forthwith." 45 C.F.R. § 233.-120(2)(5). This accords with the Senate Report on the 1967 amendments showing that "immediate action is necessary" to alleviate "an immediate need" for emergency assistance. Sen. Rep. No. 744, 90th Cong., 1st Sess., 2 U.S. Code Cong. & Admin. News at 3002 (1967).

Plaintiffs have not satisfied us that Judge McMillen was wrong in stating in his March 14, 1975, order that

"Up to this date there has been no evidence of delays outside of Cook County * *." If, on remand, plaintiffs can show that payments are not delivered "forthwith" in the downstate Illinois counties, the district court should require the state defendants to adopt other methods (such as disbursing orders or preposition checks) to avoid unnecessary delays in alleviating destitution. See *Purnell* v. *Edelman*, 511 F. 2d 1248 (7th Cir. 1974); *Adens* v. *Sailer*, 312 F. Supp. 923 (E.D. Pa. 1970).[4] However, if downstate payments are quickly processed and received by mail one or two days afterwards, judicial intervention will be unnecessary.

In closing, we are not satisfied that the district court's order of March 14, 1975, failed to provide plaintiffs with adequate relief with respect to the "forthwith" requirement. On remand, that court will surely retain continuing jurisdiction or otherwise afford plaintiffs further relief if they can show the necessity therefor.

The order of March 14, 1975, is affirmed. The order of November 21, 1974, is reversed insofar as it sustained the validity of the Illinois program for emergency assistance. Costs of this appeal are awarded to plaintiffs.

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[4] Since the court ordered the same delivery procedures for the downstate counties as for Cook County, we cannot agree that the court discriminated in favor of Cook County in violation of Section 402(a)(1) of the Act and 45 C.F.R. § 250.120(a).

APPENDIX D

United States District Court, Northern District of Illinois, Eastern Division

No. 73 C 2453

VENUS MANDLEY, ET AL., PLAINTIFFS

v.

JAMES L. TRAINOR, ACTING DIRECTOR OF THE ILLINOIS DEPARTMENT OF PUBLIC AID, ET AL., DEFENDANTS

DECISION

The defendant Illinois Department of Public Aid filed its Report on February 18, 1975 in compliance with this court's order of February 5, 1975. Plaintiffs filed their objections thereto in the form of a Response and a Supplement on February 21 and February 24, 1975. Defendant has not modified its Report subsequent to plaintiffs' objections.

The objections by the plaintiffs do not refer to specific paragraphs of the defendant's report but deal with subject matters, as follows:

I. *Mailing of checks from the Bureau of Fiscal Operations in Chicago* to emergency assistance recipients in Cook County. Plaintiffs propose that defendant use its existing messenger service for delivering checks to local offices, and to supplement this by special messengers for immediate delivery. To the extent that the delivery of a check will be expedited by use

of the existing messenger service, this proposal should be adopted, although it will result in delivery to defendant's offices instead of to the recipient's address.

Use of the mails should not be mandatory, but defendant's agents should be given discretion to use the most prompt means available. This includes direct mail to the recipient, special delivery mail to the recipient when requested by the local office, messenger delivery to the local office followed by personal pick-up by the recipient, or personal pick-up at the Bureau of Fiscal Operations in Chicago.

II. *"Immediate delivery" in the 101 other Illinois counties* by use of local disbursing orders. Up to this date there has been no evidence of delays outside of Cook County and no evidence of alternative methods of delivery besides the U.S. Postal Service. The court will authorize the same procedure to be used in downstate counties as is used under par. I above, unless and until plaintiffs demonstrate that payments are not thereby delivered "forthwith". We believe that the par. I procedures will provide a *prima facie* satisfaction of the uniformity requirement of 45 C.F.R. § 205.120(a).

III–A. *The intervention of the Regional Office Emergency Assistance representative* in requesting the issuance of a check by the Bureau of Fiscal Operations (step c. on page 4 of defendant's Report) is objected to as an unnecessary "bureaucratic procedure". We agree that the local office administrator should be given the authority to determine whether an applicant has exhausted his 30-day emergency assistance within the past 12 months (as is apparently required for Federal matching purposes) and, if not exhausted, to request a check from the appropriate Bureau of Fiscal Operations. In fact, the caseworker who is

handling the request should be authorized to take these ministerial steps in the event the local administrator is unavailable, subject to verification by a call-back or use of a simple numerical code.

III–B. *Defendant will be required to file a report* after 30-days' experience with the new procedure as modified in accordance with the foregoing. Such a report should show the number of checks issued for emergency assistance in Cook County and downstate and the time elapsed between the initial notification by the applicant and his receipt of a check. This report can be implemented by requiring the recipient to acknowledge when his check is received and is not intended by the Court to be continued after the 30-day period if it demonstrates that the new system is resulting in delivery forthwith.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant Illinois Department of Public Aid shall implement the emergency assistance procedure described in their February 18, 1975 Report, as modified hereinabove, by amending, publishing and circulating to all Illinois Department of Public Aid personnel the A.F.D.C. Manual materials attached to the Report and

IT IS FURTHER ORDERED that the Report filed Feb. 18, 1975 is approved except to the extent it is inconsistent with this Decision, and the plaintiffs' objections are overruled to the extent that they have not been sustained hereinabove, and

IT IS FURTHER ORDERED that said defendant report to the court the length of time required for delivering emergency assistance payments after notification by the applicant, covering a period of 30 days' after the foregoing order has been complied with.

232-453—77——5

This case will be called for a status report on Thursday, May 1, 1975 at 10:00 a.m.

Enter.

/s/THOMAS R. MCMILLEN
Judge, U.S. District Court.

Dated: March 14, 1975.

APPENDIX E

United States District Court, Northern District of Illinois, Eastern Division

No. 73 C 2453

VENUS MANDLEY, ET AL., PLAINTIFFS

v.

JAMES L. TRAINOR, ACTING DIRECTOR OF THE ILLINOIS DEPARTMENT OF PUBLIC AID, THE ILLINOIS DEPARTMENT OF PUBLIC AID AND THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, DEFENDANTS

DECISION

This case came on to be tried as a complaint testing the administration of emergency relief to A.F.D.C. recipients in Illinois. Plaintiffs represent a class of beneficiaries who have allegedly been denied emergency benefits under the defendants' program as it existed in July 1974. Both sides have submitted evidence in the form of testimony, depositions and exhibits and agreed to be bound by a decree under F.R.C.P. 23(b)(3). On the basis of all the evidence, we find and conclude that Illinois' program for emergency assistance conforms to the requirements of Federal and State law, with the exception that the processing is too slow.

Plaintiffs attack the program on the ground that only certain types of emergencies are provided for under Illinois' plan and contend that § 406(e) of the

Social Security Act requires such assistance for all families receiving benefits under the A.F.D.C. program when they encounter any emergency.

Section 406(e)(1) provides in relevant part as follows (42 U.S.C. § 606(e)(1)):

> (e)(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period * * * where such child is without available resources, the payments, care or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, * * *
>
> (A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and
>
> (B) such services as may be specified by the Secretary; but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

The Federal defendant allows the State considerable latitude in determining whether it is to have any emergency assistance program and, if it does, what the program covers. For example, 45 C.F.R. § 233.120 (a) provides:

> § 233.120 Emergency assistance to needy families with children.
>
> (a) *Requirements for State plans.* A state plan under Title IV, Part A, of the Social Security Act, providing for emergency assistance to needy families with children must:
>
> (1) Specify the eligibility conditions imposed for the receipt of emergency assistance.

These conditions may be more liberal than those applicable to other parts of the plan.

(2) Specify if migrant workers with families will be included and, if emergency assistance will not be available to them Statewide, the part or parts of the State in which it will be provided.

(3) Specify the emergency needs that will be met, whether mass feeding or clothing distribution are included, and the methods of providing payments, medical care, and other remedial care.

(4) Specify which of the following services will be provided: Information, referral, counseling, securing family shelter, child care, legal services, and any other services that meet needs attributable to the emergency or unusual crisis situations.

(5) Provide that emergency assistance will be given forthwith.

Furthermore, on March 20, 1973 H.E.W. wrote to the original defendant Joel Edelman as Director of the Illinois Department of Public Aid as follows:

> The Federal regulation requires that the State plan must: "(3) specify the emergency needs that will be met * * *" States are free under Federal policy to develop their own definition of the kind of emergencies they will meet under this program. Their definition may be as broad or as narrow as they wish, within the scope of the criteria in Federal policy.

45 C.F.R. § 233.10 was amended effective July 24, 1974, apparently to conform to *Townsend* v. *Swank*, 404 U.S. 282 (1971), and provides:

> (a) *State plan requirements.* A State plan under title I, IV–A, X, XIV, or XVI, of the Social Security Act must:
>
> (1) Specify the groups of individuals, based on reasonable classifications, that will

be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act. Under this requirement:

(i) A State shall impose each condition of eligibility required by the Social Security Act; and

(ii) A State may:

(A) Provide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorizes more limited coverage;

(B) Impose conditions upon applicants for and recipients of public assistance which, if not satisfied, result in the denial or termination of public assistance, if such conditions assist the State in the efficient administration of its public assistance programs, or further an independent State welfare policy, and are not inconsistent with the provisions and purposes of the Social Security Act.

(iii) There must be clarity as to what groups are included in the plan, and which are within, and which are outside, the scope of Federal financial participation.

(iv) Eligibility conditions must be applied on a consistent and equitable basis throughout the State.

Agency regulations and interpretations are of course entitled to great weight in applying the statute. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Wilson* v. *Weaver*, —— F. 2d ——, (7th Cir. #73-1541 et al.,

May 9, 1974). We conclude that the foregoing regulations and letter tolerate the defendants' decision to cover only certain categories of emergencies.

The defendants' plan for emergency relief is limited to four categories of emergencies. These are listed in Plaintiffs' Ex. 4 as follows:

> An "emergent need" exists when one of the following crisis situations occurs:
>
> 1. The AFDC family is homeless (without shelter) as a result of damage to the building rendering it uninhabitable (example: fire, condemnation).
>
> 2. A court-ordered eviction occurs for reasons other than the recipient's failure to pay rent.
>
> 3. The AFDC family is potentially homeless due to damage to a portion of the building.
>
> 4. The AFDC applicant, determined presumptively eligible for AFDC, is in emergent need of clothing and/or household furnishings and equipment. (Emergent food and rent can also be authorized by disbursing order at the time the applicant is determined presumptively eligible as provided in this paragraph. Any amount thus authorized may not exceed the amount calculated as the applicant's first month's payment, and will be deducted from the applicant's first month's payment.)
>
> Verification by staff of the emergent need is required prior to authorization of Emergency Assistance.

These four categories were promulgated by the former defendant Joel Edelman on October 2, 1973 and narrowed the previous emergency assistance categories considerably. Illinois' new plan was approved by H.E.W. on June 20, 1974. The previous plan, which

plaintiffs now seek to have reinstated, had never been approved, but Federal funds were disbursed to the State nonetheless. Many persons who would have been eligible for emergency relief under the old plan are admittedly unable to obtain it under the new plan, with the result that public expenditures for this purpose have been reduced and private charities have picked up much of the load, unwillingly. The new plan provides no emergency relief for the robbery which allegedly befell the plaintiff Gallman, for example. Plaintiffs also mention agency error, vandalism and parental desertion.

This result does not violate either the Social Security Act or the Fourteenth Amendment to the Constitution, however. *Townsend* v. *Swank*, supra p. 4, does not require the alleviation of all emergencies sustained by victims of A.F.D.C. but merely requires that the aid be dispensed with an even hand and in accordance with the requirements of the Social Security Act. Illinois' new program fulfills the requirements of § 406(e)(1) and the regulations thereunder, and this State is not obliged by the statute or the Constitution to revert to the more liberal policy which was in effect before October 2, 1973.

Plaintiffs contend that they are deprived of equal protection of the law because some recipients of A.F.D.C. can receive emergency relief and some cannot. This occurs, of course, because some recipients encounter the type of emergencies which Illinois chooses to cover and some do not. Regulation 233.10 (a)(1), supra p. 4, in substance requires eligibility conditions which are not arbitrary, unreasonable or inequitable. Assuming that the plaintiffs are complaining of the inequitable administration of the Illinois statute rather than the provisions of the statute itself,

the evidence shows that defendants' classifications of emergencies are based on sound and valid criteria. These criteria include the frequency of occurrence and the feasibility of verifying it. Lurking in the background is also the fact that some emergencies can be handled by private agencies or by other programs of the State, but these considerations are apparently involved in another lawsuit, not here. Without attempting to summarize the evidence (and plaintiffs have not deemed it necessary to do so), we find and conclude that defendants' selection and classification of emergencies is not arbitrary or unreasonable and does not discriminate against any group of A.F.D.C. recipients. *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).

If Illinois' program complies with Federal law, then the plaintiffs have no cause of action against the Federal defendant. Likewise the fact that the burden of emergency relief is returned to private charities is not violative of any section of the Federal or Illinois statutes. The policy of the statute, including such cases as *Memorial Hospital, et al.* v. *Maricopa County, et al.* 415 U.S. 250 (1974), is not to replace private charities with public aid but to help alleviate need to the extent which Congress sees fit to do so.

Plaintiffs also assert a pendent claim that Illinois' new program violates § 12–8 of the Illinois Public Aid Code (Ch. 23, *Ill. Rev. Stat.*) This contention is not cognizable as a pendent action if the principal action fails. Furthermore, we do not choose to pass on the interpretation of the Illinois statute before the state courts have an opportunity to do so, particularly since a case is presently pending in the Circuit Court of Cook County covering some of the same issues in the case at bar.

Plaintiffs' final contention is that emergency payments are not made "forthwith" as required by Reg. 233.120(a)(5), supra p. 3. The new program took some of the discretion away from local offices and caseworkers and centralized the administration of the program in Springfield. This was to prevent duplication and other abuses but does result in slower payments. Unfortunately plaintiffs were unable to present any satisfactory statistics concerning the amount of increased delay caused by the new program or any alternative program by which delay could be significantly reduced. In fact, their principal proposal in this respect seems to be to require H.E.W. to "monitor" all emergency requests in its Chicago office, which in our opinion would merely add one more layer of administrative delay to the present program.

Illinois' plan was amended on July 10, 1974 to provide that "Verification by staff * * * shall be accomplished immediately", and that requests shall be processed "immediately upon verifying the need". Certainly the letter of these rules complies with the requirement to provide emergency assistance "forthwith", but the plaintiffs' evidence shows by the weight of the evidence that 7–10 days' delays in making emergency payments are not uncommon.

Defendant Edelman had decentralized some of the procedures in the event of certain dire emergencies. We find and conclude that his successor can and should do more. The record is not clear as to whether the previous program produced more prompt payment than the current one, and if so, why, but defendant should devise a method to overcome these administrative delays on a formalized and systematic basis. We see no good reason why emergency payments

should have been completely taken out of the hands of the caseworker or the local offices and suggest this is one cause of the delays.

The State acknowledges that it plans to proceed with more decentralization. We feel certain that it can do so, perhaps after consultation with plaintiffs and with the private agencies which are *amicus curiae*. We will require the State defendant to devise and file a proposal for emergency payments which will more nearly satisfy the requirement of Regulation 233.120(a)(5). See *Adens* v. *Sailer*, 312 F. Supp. 923 (E.D. Pa. 1970).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in behalf of the defendants on the Amended Complaint insofar it challenges the content of former defendant Edelman's emergency assistance program as it existed on October 2, 1973, but the State defendant is ordered to show cause within a reasonable time hereof how the administration and delivery of emergency assistance can be expedited, preferably on the next court date.

This case will be called for a progress report on Tuesday, December 3, 1974 at 10:00 a.m.

Enter.

/s/ THOMAS R. MCMILLEN,
Judge, U.S. District Court.

Dated: November 21, 1974.

APPENDIX F

United States Court of Appeals For the Seventh Circuit, Chicago, Ill.

No. 76–1865

VENUS MANDLEY, ET AL., PLAINTIFFS-APPELLANTS

v.

JAMES L. TRAINOR, ET AL., DEFENDANTS-APPELLEES

Before Hon. WALTER J. CUMMINGS, Circuit Judge, Hon. PHILIP W. TONE, Circuit Judge, and Hon. WILLIAM J. CAMPBELL, Senior District Judge*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 73 C 2453 Thomas R. McMillen, Judge

December 14, 1976

ORDER

On consideration of the petition for rehearing,

IT IS ORDERED that "allocated" be substituted for "appropriated" in lines 1 and 13–14 of page 13 of the slip opinion of November 23, 1976.

No member of the panel and no judge in regular active service having voted for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the appellee, F. David Mathews, is denied.

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*Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

APPENDIX G

42 U.S.C. 601:

Appropriations.

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

42 U.S.C. (Supp. V) 602(a)(1) and 10:

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; * * *

* * * * *

(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have

232-453—77——6

opportunity to do so, and that aid to families with dependent children shall, subject to paragraphs (25) and (26), be furnished with reasonable promptness to all eligible individuals;

42 U.S.C. (and Supp. V) 603(a)(1) and (5):

Payment to States; computation of amounts;
* * *

(a) From the sums appropriated therefor, the Secretary of the Treasury shall pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958—

(1) in the case of any State other than Puerto Rico, the Virgin Islands, and Guam, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as aid to families with dependent children under the State plan (including expenditures for premiums under part B of subchapter XVIII of this chapter for individuals who are recipients of money payments under such plan and other insurance premiums for medical or any other type of remedial care or the cost thereof)—

(A) five-sixths of such expenditures not counting so much of any expenditure with respect to any month as exceeds the product of $18 multiplied by the total number of recipients of aid to families with dependent children for such month (which total number, for purposes of this subsection means (i) the number of individuals with respect to whom such aid in the form of money payments is paid for such month, plus (ii) the number of other individuals with respect to whom expenditures were made in such month as aid to families with dependent children in

the form of medical or any other type of remedial care, plus (iii) the number of individuals, not counted under clause (i) or (ii), with respect to whom payments described in section 606(b)(2) of this title are made in such month and included as expenditures for purposes of this paragraph or paragraph (2)); plus

(B) the Federal percentage of the amount by which such expenditures exceed the maximum which may be counted under clause (A), not counting so much of any expenditure with respect to any month as exceeds (i) the product of $32 multiplied by the total number of recipients of aid to families with dependent children (other than such aid in the form of foster care) for such month, plus (ii) the product of $100 multiplied by the total number of recipients of aid to families with dependent children in the form of foster care for such month; * * *

* * * * *

(5) in the case of any State, an amount equal to 50 per centum of the total amount expended under the State plan during such quarter as emergency assistance to needy families with children.

42 U.S.C. 606 (a), (b), and (e):

Definitions.

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, step-

mother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parents and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Sec-

retary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child, and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination

referred to in clause (A) for any individual with respect to whom it is made;

* * * * *

(e)(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary;

but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

45 C.F.R. 233.20(a)(2)(v):

Need and amount of assistance.

(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

* * * * *

(2) *Standards of assistance.*

* * * * *

(v) If the State agency includes special need items in its standard, (*a*) describe those that will be recognized, and the circumstances under which they will be included, and (*b*) provide that they will be considered in the need determination for all applicants and recipients requiring them.

45 C.F.R. 233.120:

Emergency assistance to needy families with children.

(a) *Requirements for State plans.* A State plan under Title IV, Part A, of the Social Security Act, providing for emergency assistance to needy families with children must:

(1) Specify the eligibility conditions imposed for the receipt of emergency assistance. These conditions may be more liberal than those applicable to other parts of the plan. (See paragraph (b)(1) of this section for scope of Federal financial participation.)

(2) Specify if migrant workers with families will be included and, if emergency assistance will not be available to them Statewide, the part or parts of the State in which it will be provided.

(3) Specify the emergency needs that will be met, whether mass feeding or clothing distribution are included, and the methods of providing payments, medical care, and other remedial care.

(4) Specify which of the following services will be provided: Information, referral, counseling, securing family shelter, child care, legal services, and any other services that meet needs attributable to the emergency or unusual crisis situations.

(5) Provide that emergency assistance will be given forthwith.

(b) *Federal financial participation.* Beginning with the effective date of approval of the amendment to the State plan for AFDC which provides for emergency assistance to needy families with children pursuant to section 406(e) of the Act:

(1) Federal financial participation is available for emergency assistance to or on behalf of a needy child under the age of 21 and any other member of the household in which he is living if—

(i) Such child is (or, within 6 months prior to the month in which such assistance is requested, has been) living with any of the relatives specified in section 406(a)(1) of the Act in a place of residence maintained by one or more of such relatives as his or their own home,

(ii) Such child is without resources immediately accessible to meet his needs,

(iii) The emergency assistance is necessary to avoid destitution of such child or to provide living arrangements for him in a home, and

(iv) His destitution or need for living arrangements did not arise because he or such relative refused without good cause to accept employment or training for employment.

(2) The rate of Federal financial participation in expenditures during a quarter as emergency assistance in accordance with the provisions of an approved State plan is 50 percent of the total amount of such expenditures which are (i) in the form of money payments,

payments in kind, or such other payments as the State agency specifies, including loans and vendor payments, or medical or remedial care recognized under State law, with respect to or on behalf of individuals described in subparagraph (1) of this paragraph; (ii) for administration, including costs incurred in determining eligibility, in the payment process, and for other related administrative activities; and (iii) for the following services provided to individuals described in subparagraph (1) of this paragraph, directly by staff of the agency, or by purchase from other sources: Information, referral, counseling, securing family shelter, child care, legal services, and any other services that meet needs attributable to the emergency or unusual crisis situations.

(3) Federal matching is available only for emergency assistance which the State authorizes during one period of 30 consecutive days in any 12 consecutive months, including payments which are to meet needs which arose before such 30-day period or are for such needs as rent which extend beyond the 30-day period. Another condition for Federal participation is that the State has a reasonable method of determining the value of goods in kind or services provided for emergency assistance.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

(No. 73 C 2453)

VENUS MANDLEY, ET AL., PLAINTIFFS

v.

JAMES L. TRAINOR, ETC., ET AL., DEFENDANTS

Received November 26, 1975.

THOMAS R. MCMILLEN, Judge, United States District Court.

FINAL JUDGMENT AND DECREE

This matter comes on for entry of a final judgment and decree pursuant to prior decisions of this court and pursuant to the mandate of the Court of Appeals reversing in part and affirming in part the orders of this court to and including this court's order of March 14, 1975. The court being fully advised finds and concludes as follows:

FINDINGS OF FACTS

1. Except as modified herein, the factual findings of this court's memorandum decisions of November 21, 1974, February 5, March 14, August 1, and October 24, 1975 are incorporated herein as part of this final judgment.

2. The class of plaintiffs is composed of all (1) Aid to Families with Dependent Children (AFDC)

recipients, (2) applicants for AFDC and (3) other families with needy children, in Illinois who are eligible for emergency assistance within the eligibility standard of 606(e), as set out in paragraph 9 E standard of § 606(e) of the Social Security Act (the Act), 42 U.S.C. § 606(e), as set out in paragraph 9 (p. 5) below

3. Plaintiff Frances Gallman and her family met the eligibility standard of § 406(e) at the time of their application in November, 1973, to defendant Illinois Department of Public Aid (IDPA) for emergency assistance.

4. Defendants IDPA and its directors Edelman and Trainor have denied and continue to deny emergency assistance to plaintiff Gallman and to members of the plaintiff class who meet the eligibility standard of § 406(e) but whose emergency need arises from circumstances other than those described in defendants' regulations, IDPA Categorical Assistance Manual Ch. 6500, since renumbered as Ch. PO 610.5.

5. The state defendants have reported to this court the length of time taken to process requests for emergency assistance, these reports having been made pursuant to the court's order of March 14, 1975. There the court required defendants to speed up the processing of emergency assistance requests from the "not uncommon" 7–10 days found by the court in its order of November 21, 1973, so that emergency assistance requests will normally be disposed of within 24 hours. These reports show and I find as follows:

a. For requests for emergency assistance granted during the two reporting periods, May 8–June 9, 1975 and August 1–27, 1975, the periods of time taken for processing requests up to the time a check was ready to be placed in the mail or for pick up was more than one day in 83.88 (103 of 116) of cases in Cook County and in

	Cook	Percent	Downstate	Percent
Same day or 1 day	13	11	27	28. 4
2–3 days	22	18. 6	26	27. 4
4–6 days	40	33. 9	21	22. 1
7–10 days	16	13. 6	13	13. 7
11–15 days	17	14. 4	7	17. 4
16–25 days	7	5. 9	1	1. 1
26 or more days	1	. 8	0	0
Not ascertained	2	1. 7	0	0
Total	118	99. 9	95	100. 1

b. For requests for emergency assistance granted during the two reporting periods (May 8–June 9 and Aug. 1–27, 1975) four methods of delivery of emergency assistance checks were used: mail, pick up by client at fiscal management office, disbursing order at local office and by "C.D." (unexplained), as follows:

	Cook	Downstate
Mail	60	74
Disbursing Order	16	0
Pick-up at Fisc. Mgmt	42	9
C.D	0	12
Total	118	95

c. The amount of time from the date a check was ready for delivery by mail until receipt by the client during the two reporting periods was as follows:

	Cook	Downstate
1 day	31	34
2 days	8	6
3 days	0	1
4–6 days	0	1
7 or more days	1	3
Not ascertained	20	29
Total	60	74

Therefore, of those known, checks were delivered one or two days after mailing in 97.5 percent of cases in Cook and 88.9 percent downstate.

d. The reports demonstrate and the court finds that great and excessive delays continue to exist in the processing of emergency assistance checks, so that only a small percentage of checks are processed within 24 hours and delivered to the client within one or two days thereafter.

6. Since the mandate of the Court of Appeals was returned to this court, the state defendants have reported that they plan imminently to withdraw from the emergency assistance program authorized by section 406(e) of the Act and have further reported that they plan to provide the same limited emergency assistance available under their program which was challenged and found unlawful in this lawsuit. In so doing, defendants intend to claim federal funds for this emergency assistance program under §§ 402 and 403(a)(1) (regular AFDC funds (of the Act)).

* * * * *

CONCLUSIONS OF LAW

8. As defined in paragraph 2 above, this is a proper class action under Rule 23 of the Federal Rules of Civil Procedure.

9. The state defendants have violated and continue to violate § 406(e) of the Act in denying emergency assistance to plaintiff Frances Gallman and members of the class who are eligible for emergency assistance as defined in § 406(e), to wit: families with a needy child (i) under the age of 21, (ii) who is living with any of the relatives specified in § 406(a)(1) of the Act in a place of residence maintained by such relative as a home, (iii) where such child is without available resources, (iv) where emergency assistance is

necessary to avoid destitution of or to provide living arrangements in a home for such child, and (v) where such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment.

10. Because defendants' emergency assistance program, Categorical Assistance Manual Ch. 6500 (PO 610.5), limits eligibility more narrowly than § 406(e) permits, its enforcement and operation are unlawful.

11. Congress, in §§ 406(e) and 403(a)(5) of the Act, has determined the terms of eligibility and funding for an emergency assistance program. The state defendants' effort to avoid the eligibility standards of § 406(e) by claiming funding for emergency assistance from funds available for AFDC or for any other federally funded program is contrary to the clear intent of the Act and a violation of § 406(e)(1).

12. Defendant United States Department of Health, Education, and Welfare has violated §§ 406(e) and 402(b) of the Act, 42 U.S.C. §§ 606(e) and 602(b), and its own regulations, 45 C.F.R. § 233.10(a)(1)(ii)(A), in approving and funding Illinois' emergency assistance plan which denies such assistance to members of the plaintiff class made eligible by § 406(e).

13. Defendant H.E.W., furthermore, may not approve or fund a state's emergency assistance program, whether designated as a "special need" or otherwise, except as authorized by § 406(e).

14. The state defendants have violated and continue to violate § 406(e) of the Act and regulations promulgated thereunder, 45 C.F.R. § 233.120(a)(5), which require that emergency assistance be given

forthwith, by causing, and failing to correct after this court's order of November 21, 1974, serious delays in providing emergency assistance to members of the plaintiff class.

IT IS THEREFORE ORDERED AND DECREED, as follows:

A. Defendants the Illinois Department of Public Aid, Joel Edelman and James L. Trainor, their successors in office, agents, employees and assigns are enjoined, so long as Illinois receives federal funding under Title IV-A of the Social Security Act, from claiming reimbursement for emergency assistance (however designated) under any other section of the Act than §§ 406(e) and 403(a)(5) and are enjoined from using any other means of limiting eligibility for emergency assistance more narrowly than the provisions of § 406(e), and are further enjoined from denying emergency assistance to plaintiff Frances Gallman and to any member of the plaintiff class with a needy child

(i) who is under the age of 21,

(ii) who is living with any of the relatives specified in § 406(a)(1) of the Act in a place of residence maintained by such relative as a home,

(iii) where such child is without available resources,

(iv) where emergency assistance is necessary to avoid destitution of or to provide living arrangements in a home for such child, and

(v) such destitution did not arise because such child or relative refused without good cause to accept employment or training for employment.

In furtherance of this injunction these defendants are specifically directed to do the following:

1. Within 7 days from entry of this order, defendants shall file with the court and with defend-

ant HEW amendments to its AFDC Categorical Assistance Manual (and to forms and other necessary instructions to staff) consistent with the terms of this order. These amendments shall

(a) Set forth the availability of emergency assistance to families with a needy child in the terms set out in (i)–(v) above.

(b) Specify that non-AFDC eligible children are eligible for emergency assistance if they meet the eligibility standards of (i)–(v) above.

(c) Until HEW files regulations under paragraph B–1 below, establish a definition of the terms "lack of available resources" and "necessary to avoid destitution" which are compatible with providing emergency assistance when a needy child is approaching destitution.

(d) Establish amounts of assistance, forms of payment and types of services to be provided.

(e) Set forth examples of common forms of destitution to be avoided by provision of emergency assistance, including, but not limited to imminent eviction, imminent termination of utilities, and lack of food, basic clothing and household furnishings.

(f) Set forth examples of common causes of such destitution, including but not limited to fire and other disaster causing homelessness or damage to personal possessions, eviction, theft, abandonment by a parent, delays in awaiting normal processing of AFDC applications, failure to receive AFDC assistance due to administrative error and failure to receive other forms of income.

2. Defendants' submission pursuant to paragraph A. 1(p. 8) herein shall not define eligibility more narrowly than § 406(e) of the Act and shall be equitable as required by 45 C.F.R. § 233.10(a)(1)(ii).

3. Defendants shall review within 30 days from entry of this order the IDPA hearing decision, No. 73-4155, of March 18, 1974 denying emergency assistance to plaintiff Frances Gallman in the circumstances alleged in this complaint, and shall enter a new decision in compliance with the Court of Appeals decision and this order. Such decision shall be promptly filed with this court and defendants shall report all further action including payment made with respect to her administrative appeal.

4. In order to assist the parties and this court with further proceedings for compliance the state defendants shall, within 30 days of the entry of this order, commence to register all requests by needy families with children for emergency aid, categorizing such requests by a) type of need, b) cause of need, c) department response, and d) reasons for denial if denial of the request occurs, and shall submit to this court monthly until further order of court the information obtained from such registry.

5. Plaintiffs shall have 7 days after submission of the materials required in paragraphs A. 1-4 herein in which to file comments or objections.

B. Defendant U.S. Department of Health, Education and Welfare is hereby enjoined from approving state plans for emergency assistance which limit eligibility more narrowly than § 406(e) of the Act or funding an emergency assistance program (however designated) under any provision of the Act other than §§ 406(e) and 403(a)(5). In furtherance of this injunction, H.E.W. is specifically ordered as follows:

1. Within 60 days from entry of this order, it shall file with the court proposed regulations governing emergency assistance, which proposed regulations shall be in accord with the opinion of the Court of Appeals, with this order and with 45 C.F.R. § 233.10(a)(1)(ii)(A).

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(a) Plaintiffs shall have 15 days after submission of the proposed regulations in which to comment.

(b) Upon approval by this court and completion of procedures required by law for promulgation of regulations, defendant H.E.W. shall publish the regulations in the Federal Register and Code of Federal Regulations.

2. Within 90 days after submission of Illinois' plan for emergency assistance pursuant to Paragraph A (pp. 7–9) above, H.E.W. shall notify the court and the parties of its action in approving or disapproving the amended plan in accordance with standards set by the Act, this order and the decision of the Court of Appeals.

C. Defendants Illinois Department of Public Aid, Joel Edelman and James L. Trainor, their successors in office, employees, agents and assigns are enjoined from failing to ensure that emergency assistance grants are given forthwith to members of the plaintiff class, and are specifically directed in furtherance of this injunction to modify their procedures to provide as follows:

1. Caseworkers and necessary supervisory and other assistance over all other work assignments. Within 24 hours of a request staff shall verify need, determine eligibility and follow all necessary procedures to secure issuance of the emergency assistance payment, whether by disbursing order or check. This time period may not be extended except—

(a) for the time attributable to delay caused by an applicant's failure to provide essential information within his or her understanding and immediate control, or

(b) by waiver signed by the applicant for emergency aid.

Delay based upon an applicant's fault in (a) above shall be clearly described in the applicant's case record maintained by the department. In a case of waiver, the original waiver shall be maintained in the case record and the applicant shall be furnished a copy.

2. An individual requesting emergency assistance shall be advised orally and in writing during the initial interview that if eligible he or she may receive a disbursing order at the local office that day or within 24 hours of the request or, if the client prefers, a check may be mailed from Springfield or Chicago to an address provided by the client.

3. An applicant for emergency assistance not yet regularly receiving AFDC, as well as an applicant for emergency assistance currently receiving AFDC, shall have his or her emergency assistance request acted upon within the time limits of paragraph 1 above.

4. Defendant Trainor shall amend the Department's Categorical Assistance Manual to incorporate paragraphs B 1, 2 and 3 above.

(a) A copy of the amendment shall be submitted to the court not later than 15 days from entry of this order. Plaintiffs may within 10 days thereafter file comments in response thereto.

(b) Defendants shall distribute the bulletin or amendment to casework staff within 10 working days after receipt of the court's approval of it.

(c) The amendment issued in compliance with this order shall be filed with the court and shall not be modified or in any way changed without obtaining leave of court beforehand.

5. For each month beginning with the first month following entry of this order and continuing thereafter until further order of the court, defendants shall report their compliance

with this order in a form substantially similar to defendants' reports of June (undated) and September 18, 1975, with additional information showing the cause for any delay greater than 24 hours from the time of request until a disbursing order or check is ready for delivery.

D. Defendant Trainor is further ordered to give notice to class members by the following methods:

1. In the next regular mailing for AFDC warrants, defendants shall enclose a notice setting out in easily understandable language the changes in emergency assistance effected by this order.

2. Within 60 days of entry of this order, defendant shall cause to be prominently displayed in all public areas of each public aid office in Illinois a poster describing in easily understandable language the material terms of this order.

3. The notice described in paragraph 1 and the poster described in paragraph 2 shall describe the type of need and possible circumstances under which emergency assistance is available and the conditions of eligibility for program.

E. This order and compliance with this order shall not be interpreted as altering or in any manner affecting other obligations defendants have with respect to providing prompt assistance to AFDC applicants and recipients and/or providing emergency assistance to AFDC applicants and recipients pursuant to other judgments rendered prior to the date of this order or pursuant to state law.

F. This judgment shall be binding on defendants, their officers, agents, attorneys, servants, employees and their successors, and upon those persons in active concert or participation with them who receive actual notice of the judgment by personal service or otherwise.

G. This court shall retain continuing jurisdiction over this cause for purpose of enforcement.

H. Plaintiffs are awarded their costs in this matter.

THOMAS R. MCMILLEN,
United States District Judge.

Date: November 29, 1976.

APPENDIX I

In the Supreme Court of the United States

Miscellaneous No. ——

In Re: Application of Department of Health, Education, and Welfare

AFFIDAVIT OF NICHOLAS NORTON, COMMISSIONER, ASSISTANCE PAYMENTS ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

CITY OF WASHINGTON
District of Columbia ss

I, Nicholas Norton, being duly sworn, do depose and say, that:

1. I am the Commissioner of the Assistance Payments Administration (APA), of the Social and Rehabilitation Service (SRS), Department of Health, Education, and Welfare (HEW). I administer APA under the direction of the Administrator of SRS.

2. As Commissioner of APA, I advise the Administrator of SRS on matters relating to financial assistance and employment incentive programs; coordinate the development, implementation, and monitoring of APA program objectives and operations with other SRS organizations; develop and recommend legislation, regulations, procedures, systems, organization models, and staffing patterns related to the APA programs; and develop and propose the budget for the APA administered programs. (Statement of Organization, Functions and delegations of Authority, 40 Federal Register 17622 (April 21, 1975)).

3. On November 29, 1976, the United States Dis-

trict Court for the Northern District of Illinois, Eastern Division, pursuant to the mandate of the United States Court of Appeals for the Seventh Circuit, ordered HEW to file, within sixty days, proposed regulations governing emergency assistance for needy families with children under title IV–A of the Social Security Act. The Court also enjoined HEW from approving state programs for emergency assistance (EA) which limit eligibility more narrowly than § 406(e) of the Social Security Act, or from funding "an emergency assistance program (however designated)" under any provision of the Act other than §§ 406(e), which defines "emergency assistance," and 403(a)(5), the funding provision.

4. In the absence of an express statutory requirement, HEW has historically been given discretion whether or not to issue regulations. Indeed, with respect to many sections of the Social Security Act, no regulations have ever been issued, and HEW does not contemplate issuing regulations.

If the order of the District Court is not stayed, not only will this discretion be irreparably breached prior to review by the Supreme Court, but once compliance occurs the issue will be moot.

5. Furthermore, if the Department of Health, Education, and Welfare is required to submit the proposed regulations to the District Court, and if they are approved and promulgated prior to Supreme Court review of the decisions of the Court of Appeals, HEW will suffer irreparable injury due to the immediate and substantial burdens of enforcement which would result, and which would be rendered meaningless if the Supreme Court ultimately overturns the decision of the Seventh Circuit.

After promulgating regulations in accord with the Court Order, HEW would be required to review the

plans of all states which had either an EA program, or special circumstance items in their AFDC plan, or both, since compliance with the new regulation would require an EA program to be broad enough to meet *all* the emergency needs of *all* eligible families. In addition, HEW would be required to ascertain if any State had special circumstance provisions dealing with emergency situations that rose to the level of a emergency assistance "program." The AFDC program is in operation in fifty-four states.[1] Since only four states have neither EA nor special circumstance items the burdensome review procedures outlined below would be multiplied at least forty-six times over.

This review of the states' compliance with the new regulation would have two points of focus. For the twenty-seven states which have EA programs at present, there would have to be a determination of whether their programs are broad enough to comply with § 406(e) as interpreted by the court in *Mandley*. This review would be exceedingly time-consuming and would probably necessitate extensive meetings between each state and HEW staff.

For the forty-five states having special circumstance items in their AFDC plans, HEW would need to determine whether those items, funded under the more limited eligibility requirements of the AFDC plan, amounted to "an emergency assistance program" which it is now barred from funding "under any provision of the Act other than [the much broader coverage of] §§ 406(e) and 403(a)(5)." It should be noted that twenty-three of those states have chosen

[1] For the purposes of this affidavit, the term "state" includes the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

not to take advantage of the optional program authorized by these two sections of the Act.

The HEW central and regional offices would therefore have to communicate with at least forty-six states about the impact of the new regulation on their EA programs or AFDC special circumstance provisions. In the absence of a satisfactory response by the state, three major courses of action would exist for the state, two of which would entail a major expenditure of time and effort by HEW as well as the state, and the third of which would severely prejudice potential recipients.

6. The first course would be for a state to acknowledge that its EA program or AFDC plan was out of compliance with the new regulation. The state would then proceed to negotiate with the regional office to establish what changes needed to be made to come into compliance. It is unclear how much "lead time" would be allowed the states to achieve this compliance. Although it is customary for the Department to allow 90 to 100 days after a regulation takes effect, it appears that this might not be satisfactory to the court, which allowed Illinois only seven days to file amendments to its public assistance manual in order to conform to the court order. Assuming that the state was in fact allowed the time to make a good faith effort to come into compliance, HEW would have to monitor this process to make sure it was proceeding in good faith. It is likely that this would be a fairly lengthy and complicated procedure in many states, since changes in an EA plan authorized under a specific statute would most likely require new legislation, and might necessitate calling a special session of the state legislature. Changes in other state EA programs, or in most AFDC plans, might require only

administrative action, but this could be a source of further delay, particularly in states operating under an Administrative Procedures Act.

An additional difficulty results for States whose AFDC Plans have incorporated emergency-type special circumstances into a consolidated standard of need based on statistical averages, as opposed to individual grants. *See Rosada* v. *Wyman,* 397 U.S. 420 (1970), which approved of this method. Unless there is a clear train of documentation which permits tracing back to preconsolidation amounts of emergency-type special needs, it will be extraordinarily difficult to extricate them.

7. The second situation would arise if the state was not allowed the needed time, or if it communicated its intention to continue under a plan which HEW found to be out of compliance with the new court ordered regulation. HEW would have to consider initiating lengthy and costly compliance hearings to determine continued eligibility for federal financial participation. These proceedings would be conducted pursuant to 42 U.S.C. 604, and judicial review thereof would be in the appropriate Court of Appeals pursuant to 42 U.S.C. 1316(a). There is no assurance that either the hearing examiner or the Court of Appeals will agree with the *Mandley* view of the statute. The result might well be a judicial determination that a state in violation of the *Mandley* opinion and resistant to HEW's efforts to comply with *Mandley* is nevertheless in compliance with the statute. HEW and the Seventh Circuit would be powerless to affect that outcome.

Therefore, should even a few of the above consequences occur during the period following a promulgation of final regulations, but before a decision on

the merits by the Supreme Court, there will have been irreparable injury to the fiscal and program resources of HEW in the event of a ruling by the Supreme Court which is ultimately favorable to the Department.

8. Finally, a third possibility poses the most serious possible harm. In addition to direct injuries to HEW resources, there would be further irreparable harm to the government caused by injury to the integrity and purposes of the EA program itself. Failure to grant a stay in this case could lead to needless dismantling or evisceration of the state programs, and ironically result in pressure *not* to provide aid to needy families, subverting the clear Congressional intent which the Department has been delegated to carry out.

This could happen because the States' third course of action would be to eliminate emergency aid entirely in the face of either lengthy struggles to bring their programs into compliance, or lengthy compliance hearings. This would be especially true of the poorer states, since in addition to the costs of amendment or of presenting a case at a hearing, the amended plans would almost certainly have to cover more beneficiaries, and a greater number of emergencies, leading to greater cost if meaningful assistance is to continue to be provided. The Court of Appeals pointed out that a state could maintain the same level of expenditure by helping each person "more moderately," but if the numbers of beneficiaries increased considerably, each individual grant could end up being reduced to a token payment that in fact did not meet the emergency need. At present, under existing plans, benefit levels in many states are less than the amount which could fairly be characterized as "moderate." The EA pro-

gram is entirely optional with the states, and there is likewise nothing in the AFDC statute which requires a state to provide for special circumstance items. A dilemma results. If a state chooses to have an EA program, it is required to give emergency aid to each and every person made eligible by § 406(e), and if it is unwilling or unable to initiate such a program, the incentive is toward providing fewer special circumstance items so as to avoid having them characterized as an "emergency assistance program."[2]

This type of reaction to the new regulation would cause irreparable harm to the EA program by essentially ending it in some states, and depriving potential recipients of the emergency aid seen as important by Congress. Illinois and Wisconsin have already ended their EA programs in response to such a choice, and Arkansas has suspended its program due to "severe financial difficulties." The children who are the ultimate concern of both the EA and AFDC programs would suffer unnecessary harm if even one state terminates or dilutes its EA program or eliminates any AFDC special circumstance items in response to the new regulation ordered by the court in *Mandley*. This harm can be avoided by a stay of the order of the District Court so that these children's recourse to emergency aid is not jeop-

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[2] However, the Supreme Court has held, in the context of a statutory provision requiring an adjustment in the AFDC standard of need in order to reflect cost of living increases as of 1969, that New York could not eliminate any special circumstance items from the standard of need, but could only ratably reduce the amounts. *Rosado* v. *Wyman*, *supra*. Conceivably a state could find itself in a position in which the *Rosado* case or others based on its doctrine forbade eliminating an emergency item from the AFDC plan, while Department action pursuant to the *Mandley* case forbade leaving it in.

ardized in the interim period prior to decision by the Supreme Court.

9. Furthermore, HEW is charged with the orderly administration of a large and varied program for emergency assistance. In the absence of a stay, serious harm to HEW will be caused by disruption of the program even prior to promulgation of the court ordered regulation. States that presently desire to amend their EA programs, or initiate new ones, or plan for future changes, will be faced with the uncertainty of a situation in which the standards they must meet will be in a continuous state of flux until a final decision by the Supreme Court.

NICHOLAS NORTON,
Commissioner, Assistance Payments Administration, Department of Health, Education, and Welfare.

CITY OF WASHINGTON,
District of Columbia, ss.

Subscribed to and sworn to before me this 18th day of January, 1977.

FRANCES D. CURTIS.
Notary.

My Commission Expires April 14, 1979.
[Seal]

APPENDIX J

Opinion By Judge Cummings

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

November 23, 1976

Before:

Hon. Walter J. Cummings, Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. William J. Campbell, Senior District Judge [1]

VENUS MANDLEY, ET AL. PLAINTIFFS-APPELLANTS
No. 76–1865 v.
JAMES L. TRAINOR, ET AL. DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 73–C–2453

THOMAS R. McMILLAN, Judge.

This case came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Divi-

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[1] Hon. William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois sitting by designation.

sion, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this case appealed from be, and the same is hereby, reversed and remanded, in accordance with the opinion of this court filed this date.

U.S. GOVERNMENT PRINTING OFFICE: 1977

Supreme Court, U. S.
FILED
MAY 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1416

JOSEPH CALIFANO,

Petitioner,

vs.

VENUS MANDLEY, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

QUESTIONS PRESENTED FOR REVIEW.

The respondents object to the petitioner's Question 1 because this issue has never before been raised. The respondents believe that the petitioner's Question 2 is not before the Court on this petition because it pertains exclusively to *Mandley I, Mandley* v. *Trainor*, 523 F. 2d 415 (7th Cir. 1975), and the time for filing a petition for certiorari from that decision has long since past.

STATEMENT OF THE CASE.

The petitioner virtually ignores the facts of this protracted case. The respondents refer the Court to the discussion of the

facts in the opinion of the court of appeals in *Mandley II*, *Mandley* v. *Trainor*, 545 F. 2d 1062 (7th Cir. 1976). The petitioner does not dispute any of the findings of *Mandley II*, in which the court concluded that the United States Department of Health, Education and Welfare (HEW), with the other defendants, the Illinois Department of Public Aid (IDPA), and its director, created an "artifice to avoid the *Mandley I* mandate" for more than a year. *Mandley II* at 1067.

As the court below explained, the state defendants, with the cooperation and assistance of HEW, after the return of the mandate in *Mandley I*, refused at first to state whether or not they were operating an emergency assistance program with federal funds, and later stated that they were not operating such a program under § 406(e) of the Social Security Act, 42 U. S. C. § 606(e). None of the defendants informed the district court that the only change in IDPA's program was its name, and that funding was claimed under another section of the Social Security Act. These actions had the effect of delaying the remand proceedings for nearly a year and necessitating a second appeal. The court of appeals found, and the petitioner does not dispute, that "the state defendants are still operating an emergency assistance program with matching federal funds, although under the guise of a 'special assistance program'," *Mandley II* at 1067, and that this conduct is in the "blatant disregard of the congressional eligibility requirements" of § 606(e). *Mandley II* at 1064. Consequently, the petitioner is incorrect in asserting (Ptn. p. 8) that the state had notified the Secretary "of its election to terminate" the emergency program, which "therefore" led to the dismissal of the case as moot.

The petitioner is also incorrect in stating (Ptn. pp. 6, 16) that the respondents are a class of AFDC recipients. The amended complaint and the judgment state that the plaintiffs include not only AFDC families, but all needy families with children.

The petitioner fails to mention that on January 27, 1977, Mr. Justice Stevens granted a stay of the mandate until February 18, 1977, and the petitioner's motion to extend the stay beyond that date was denied by Mr. Justice Stevens (Case No. A-610). The petitioner also fails to refer to his regulation requiring emergency assistance be delivered "forthwith", 45 C. F. R. § 233.120(a)(5), and does not state that the district court held Illinois' emergency program violates this regulation in taking seven to ten days to deliver aid to eligible recipients.

REASONS FOR DENYING THE WRIT.

A. The Petitioner Has Not Presented Any Reason Which Justifies the Granting of the Writ.

Every court which has construed § 606(e) is in accord with the Seventh Circuit's interpretation. The petitioner fails to mention that, in addition to *Williams* v. *Wohlgemuth*, 540 F. 2d 163 (3d Cir. 1976),[1] the Second Circuit has held that the eligibility requirements of § 606(e) are mandatory, *Lynch* v. *Philbrook*, 550 F. 2d 793 (2d Cir. 1977). In accord are *Ingerson* v. *Sharp*, 423 F. Supp. 139 (D. Mass. 1976), and *Kozinski* v. *Schmidt* (E. D. Wis. 1975), No. 75-C-650. Each court, after examining § 606(e) and its legislative history, concluded that Congress intended that eligibility for emergency aid must include all families designated in § 606(e). The petitioner's position, without judicial support, would allow a state unfettered discretion to choose those emergencies for which it grants aid. If a state could avoid § 606(e) eligibility requirements by merely renaming its emergency program and claiming reimbursement from HEW as a part of its AFDC program, § 606(e) would, as the court of appeals explained, be totally eviscerated.

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1. The petitioner, without explanation states (Ptn. p. 11, n.6) that *Williams* followed a "different line of reasoning" than the Seventh Circuit. The respondents are unable to find such a difference.

The petitioner admits that there is no conflict among the courts of appeal, but states that *Mandley II*, by requiring compliance by HEW, ". . . has deprived the Secretary of the opportunity effectively to litigate the issue before other courts of appeal" (Ptn. p. 11). This seems to be the primary ground the petitioner presents for granting the writ. If HEW were not bound as a defendant by the *Mandley II* mandate, apparently it would ignore the holdings of the courts of appeal on § 606(e)'s mandatory eligibility requirements. The petitioner seems to assert (Ptn. pp. 10, 16-18) that he has the right to abide by one circuit's judgment but disregard it in another circuit, this enforcing § 606(e) upon the states in a varying and arbitrary manner. We submit that this Court should not grant certiorari whenever a federal agency considers itself precluded from seeking conflicting decisions from other courts of appeal.

If the petitioner was dissatisfied with *Mandley I*, he should have sought certiorari. In December 1975, the HEW Secretary applied for an extension of time to petition for certiorari, stating that Illinois had "terminated its emergency assistance program" and that an extension of time was required in order "to permit the court of appeals to consider a motion to vacate its judgment." Such motion was denied by the court of appeals on January 30, 1976. HEW chose not to file its petition thereafter and, instead, embarked on another strategy which the court of appeals found to be an evasion of the *Mandley I* mandate.

The petitioner additionally argues that the order binding HEW and requiring regulations was an abuse of discretion by the court below. However, not a single case is cited holding such relief to be improper. A federal equity court ". . . has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *NLRB* v. *Express Publishing Co.*, 312 U. S. 426, 435 (1941).

The relief granted in *Mandley II* recognized the unholy alliance between HEW and IDPA. Had HEW developed and applied uniform standards for emergency assistance after *Mandley I*[2] the connivance found to exist thereafter could have been avoided, and the needy plaintiffs would not have suffered by the delay and obfuscation. *Mandley II* requires HEW simply to take a consistent approach to § 606(e) based on the court's decision.

Since the plaintiffs alleged jurisdiction in part on 28 U. S. C. § 1361, federal mandamus jurisdiction, the court was empowered to grant such relief. Mandamus lies to require a public officer to perform a mandatory duty or to exercise his discretion when required to do so. *Roberts* v. *United States*, 176 U. S. 221 (1900); *United States ex rel. Girard Trust Co.* v. *Helvering*, 391 U. S. 540 (1937).

Neither was the requirement of the promulgation of regulations erroneous. Title 42 U. S. C. § 1302 states that the Secretary "shall" make such regulations as may be "necessary" to the efficient administration of the Social Security Act. Similar mandatory language appears in 42 U. S. C. § 1395x(v)(1), under which the HEW Secretary was required to promulgate regulations in *Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F. 2d 663 (2d Cir. 1973). *See, Caramico* v. *Secretary of the Dept. of Housing and Urban Development*, 509 F. 2d 694 (2d Cir. 1974); *Rockbridge* v. *Lincoln*, 449 F. 2d 567 (9th Cir. 1973); *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F. 2d 584 (D. C. Cir. 1971).

The order binding HEW was not only proper but necessary. The court of appeals had before it in *Mandley II* a record showing that HEW after *Mandley I* refused to inform the district

2. The court of appeals indicated in *Mandley I* that HEW by rulemaking develop "workable definitions" for the eligibility criteria of § 606(e), which it believed "should aid the states in preparing programs that are in accord with the eligibility criteria set by Congress" *Mandley I* at 422-23.

court whether the Illinois defendants were continuing to receive federal funding for their "special assistance" program. HEW sought to delay and confuse the issues before the district court in order to evade *Mandley I*. The present petition shows no change of heart.

B. The Petitioner Should Not Be Permitted to Argue That Mandley I Is Erroneous.

The petitioner attacks the holding of *Mandley I* that § 606(e) eligibility is mandatory (Ptn. pp. 13-16). He should be precluded from so arguing since he had an opportunity to make these contentions in a petition for certiorari but chose not to do so. *Federal Trade Com.* v. *Minneapolis-Honeywell R. Co.*, 344 U. S. 206 (1952); *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U. S. 169 (1932).

Even in his attack on *Mandley I*, the petitioner has given no reason to show that Congress intended to exclude a certain class of persons, such as AFDC recipients, from the definition of "emergency assistance to needy families with children" in § 606(e). Neither has the petitioner disputed the principle that "once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." *Burns* v. *Alcala*, 420 U. S. 575, 580 (1975).

The petitioner's statement that the court in *Mandley I* "rested its analysis" on 42 U. S. C. § 602(a)(10) is incorrect[3] (Ptn. p. 14). Instead, the court relied on the interpretation of the Social Security Act as a whole and the legislative intent of

3. Given the petitioner's present interpretation of § 602(a)(10), it is anomolous that he has promulgated a regulation, 45 C. F. R. § 235.70(a)(2), which applies the provisions of § 602(a)(11), also referring to "aid to families with dependent children", to emergency assistance recipients. The respondents also question whether the petitioner believes the fair hearing provision of § 602(a)(4) and the confidentiality provision of § 602(a)(9) are likewise inapplicable to emergency assistance.

§ 606(e). The court responded specifically to the § 602(a)(10) argument by explaining that § 602(a) and § 606(e) "cannot be so neatly and completely severed." *Mandley I* at 422.

C. The Petitioner's Critique of Mandley II is Erroneous and Improper.

For the first time, the petitioner now argues that *Mandley II* encroaches upon his authority under § 602(b) and HEW's "longstanding regulations" (Ptn. p. 8) on special needs to AFDC recipients. 45 C. F. R. § 233.20(a)(2)(v). See also petitioner's Question 1 (Ptn. p. 2). This issue was never presented previously by the petitioner. *Mandley II* does not reach the question of the petitioner's authority to reimburse states for "special needs." Since the petitioner did not raise this issue in the courts below, it should not be considered now. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 238-239 (1940); *McCandless* v. *Furland*, 293 U. S. 67, 74 (1934).

Section 606(e) was meant to apply to a class of persons which is broader than those who receive AFDC. The distinctions between eligibility and funding under § 602 and § 606(e) are numerous.[4] For a detailed discussion of these differences, see *Mandley II* and "Meeting Short-Term Needs of Poor Families: Emergency Assistance to Needy Families with Children", 60 Cornell L. Rev. 879 (1975). As discussed in *Mandley II* at

4. The petitioner's argument that reimbursement of the emergencies of AFDC families is exclusively under § 606(b) while those of non-AFDC families is under § 606(e) leads to absurd and discriminatory treatment of these two classes. The "forthwith" requirement of HEW, § 233.120(a)(5), for example, applies only to emergency assistance and not to special needs which the petitioner explains is governed by the "reasonable promptness" requirement of § 602(a)(10). Thus, under the petitioner's argument, non-AFDC recipients who suffer emergencies would be entitled to receive assistance more quickly than AFDC recipients. Congress intended all persons suffering emergencies to be helped immediately and did not single out AFDC recipients for slower treatment.

1069-71, the enactment of emergency assistance was meant by Congress to be a new and additional program. The legislative history demonstrates that there was no mention of limitation of eligibility to non-AFDC recipients nor discussion of "special needs" under § 602(b). The Under-Secretary of HEW, Wilbur Cohen, supported emergency assistance when he testified before the Senate Finance Committee, stating that there was "no mechanism in the existing law to meet the special needs of children which may arise in a crisis situation". Neither he nor others referred to any conflict with "special needs". Hearings before the Senate Committee on Finance on H. R. 12080, the Social Security Amendments of 1967, Public Law 90-248, 90th Cong., 1st Sess., p. 270 (1967).

Finally, the petitioner's argument that the result of denial of certiorari would mean the reduction of emergency assistance by states is speculative and conclusary. The affidavit of Nicholas Norton, upon which this argument is based, is filled with unsupported generalization and is unreliable. Congress intended § 606(e) to reach all those who are destitute as a result of an emergency. Whether a state which is required to expand eligibility to conform to § 606(e) will decide to forsake receipt of federal funding and eliminate emergency assistance altogether is highly questionable. There is no competent evidence in the record supporting the petitioner's assertion.

CONCLUSION.

The respondents pray that this Court deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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No. 76-1416

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

VENUS MANDLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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REPLY MEMORANDUM FOR THE PETITIONER

In opposing the government's petition in this case, respondents contend "Question 1 * * * has never before been raised" (Br. in Opp. 1; see *id.* at 7-8). Question 1 is "[w]hether the Secretary has the authority under Section 403(a)(1) of the Social Security Act to reimburse amounts expended by states in providing emergency 'aid to families with dependent children' [AFDC] within the meaning of Section 406(b) of the Act" (Pet. 2). That question was briefed by the government in the court of appeals and was decided by the court.

Question 1 was at the heart of this case in the court of appeals. Loosely phrased, the question is whether Congress contemplated alternative provisions for funding emergency assistance, *i.e.*, whether emergency-type assistance

could be provided through AFDC-funding under Section 403(a)(1) as well as under a more formal emergency assistance program funded through Section 403(a)(5). In the court of appeals respondents argued vigorously that "Congress did not contemplate alternative provisions for emergency assistance" (Br. 27); indeed, respondents characterized the state's attempt to pay emergency-type assistance under its AFDC program, rather than under a formal emergency assistance program, as "outright fraud" (Br. 30; see generally Br. 25-32).

In response, the government argued (Br. 10):

> [Respondents] argue that in no event can the State receive federal funds for the provision of the [emergency-type assistance] in issue in this case, unless such provision meets the requirements of Section [4]06(e). This argument is clearly wrong. If such provisions in the State plan meet the requirements of Section [4]02, funding may be provided under Section [4]03(a)(1). It is only where additional funding under Section [4]03(a)(5) is desired that the provisions of Section [4]06(e) need be met.

Thus the issue was squarely joined. And the court of appeals decided it: "[s]tripped to the bone, our holding is founded on the premise that Section 403(a)(5) is the exclusive provision for federal funding of emergency needs" (Pet. App. 13A).[1]

Respondents' suggestion that Question 1 is not properly before the Court is without any foundation. That question

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[1] The government noted in its petition for rehearing (at 14), moreover, that emergency assistance under the general AFDC provisions of Section 403(a)(1) was a category of "special need", and that the Secretary's regulations long had recognized the states' authority to pay such "special needs" under their AFDC programs.

is properly before the Court, it is of substantial importance to the administration of AFDC and emergency assistance programs, and it should be decided by this Court.

For the reasons stated here and in our petition for a writ of certiorari, it is respectfully submitted that the petition should be granted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

DOJ-1977-06

Supreme Court, U. S.
FILED
AUG 11 1977
MICHAEL RODAK, JR., CLERK

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BRIEF FOR THE PETITIONER

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August 23, 1977

Honorable Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D. C. 20543

Re: Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare v. Venus Mandley, et al., No. 76-1416

Dear Mr. Rodak:

1. The Court should be apprised of an error in footnote 16, page 27, of the brief on behalf of the Secretary in this case. In that footnote, we indicate that under Section 1118 of the Social Security Act, 42 U.S.C. 1318, a state that participates in the medicaid program under Title XIX of the Act may substitute the medicaid reimbursement formula prescribed by Section 1905(b) of the Act to determine the total reimbursement to which it is entitled under Sections 3(a), 403(a), 1003(a), 1403(a), and 1603(a) of the Act. In fact, under Section 1118 the medicaid reimbursement formula may be used only to determine the reimbursement to which the state is entitled under paragraphs (1) and (2) of Sections 3(a), 403(a), 1003(a), 1403(a), and 1603(a).

Reimbursement of payments under the program of aid to families with dependent children ("AFDC") is made under paragraph (1) of Section 403(a). But reimbursement of payments under the program of emergency assistance ("EA") is made under paragraph (5) of Section 403(a). A state therefore may not elect under Section 1118 to substitute the medicaid reimbursement formula to determine reimbursement of EA payments. Accordingly, different reimbursement formulae will govern the AFDC and EA programs, even for those states that exercise their election under Section 1118. The contrary assertion in the last sentence of footnote 16 is incorrect.

2. Counsel for respondents has called to our attention a minor error in citation on page 18 of the brief. The citation on the last two lines of that page should read: "Senate Hearings, supra, at 270. Cf. House Hearings, supra, at 847-848."

Sincerely,

Wade H. McCree, Jr.

WADE H. McCREE, JR.
Solicitor General

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1416

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

VENUS MANDLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals of November 23, 1976 (Pet. App. 1A-23A), is reported at 545 F. 2d 1062. The order of the district court of July 12, 1976, dismissing the case as moot (Pet. App. 24A), is not reported. The opinion of the court of appeals of September 25, 1975 (Pet. App. 25A-40A), is reported at 523 F. 2d 415. The district court's decision and orders of March 14, 1975 (Pet. App. 41A-44A), and November 21, 1974 (Pet. App. 45A-53A), are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 84A-85A) was entered on November 23, 1976. A timely petition for rehearing was denied on December 14, 1976 (Pet. App. 54A). On March 4, 1977, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including April 13, 1977. The petition for a writ of certiorari was filed on April 13, 1977, and was granted on June 6, 1977 (Appendix, *infra*, pp. 43-44).[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Health, Education and Welfare has authority under Section 403(a)(1) of the Social Security Act to reimburse amounts expended by the states in providing emergency "aid to families with dependent children" under Section 406(b) of the Act.

2. Whether those states that elect to provide "emergency assistance to needy families with children," under Section 406(e)(1) of the Act, must furnish such assistance to all needy families to the extent necessary to avoid destitution.

3. Whether the court of appeals improperly ordered nationwide relief on behalf of a statewide class.

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[1] On June 6, 1977, this Court also granted the petition for a writ of certiorari filed by the State of Illinois in *Quern* v. *Mandley*, No. 76-1159, and ordered that case consolidated with the instant case. A joint appendix has been filed in these cases.

STATUTES AND REGULATIONS INVOLVED

Sections 401, 402(a)(1) and (10), 403(a)(1) and (5), and 406(a), (b), and (e) of the Social Security Act, 49 Stat. 627-629, as amended, 42 U.S.C. (and Supp. V) 601, 602(a)(1) and (10), 603(a)(1) and (5), and 606(a), (b), and (e), and the relevant regulations of the Department of Health, Education, and Welfare are set forth in pertinent part at Pet. App. 55A-63A.

STATEMENT

Section 403(a)(5) of the Social Security Act, 42 U.S.C. (Supp. V) 603(a)(5), authorizes the Secretary of Health, Education, and Welfare to reimburse 50 percent of the amounts expended by a state in conducting a program of "emergency assistance to needy families with children" ("EA"), within the meaning of Section 406(e)(1) of the Act, 42 U.S.C. 606(e)(1). The State of Illinois adopted an EA program in 1973 (Pet. App. 29A).[2] That program restricted eligibility to persons who also were eligible for (and to applicants who presumptively were eligible for) "aid to families with dependent children" ("AFDC"), within the meaning of Section 406(b) of the Social Security Act, 42 U.S.C. 606(b) (Pet. App. 29A); it limited coverage to the emergency need for shelter resulting from "damage to the building" or from "eviction * * * for reasons other than * * * fail-

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[2] The State had submitted a program to the Secretary for approval in 1971; that program was revised, at the suggestion of the Secretary, to clarify its coverage, and it was adopted as revised in 1973 (Pet. App. 28A-29A).

ure to pay rent" and the emergency need for clothing or household furnishings (*ibid.*).

Respondents are "Illinois recipients of [AFDC benefits] and the Illinois and Chicago Welfare Rights Organizations" (Pet. App. 25A). Shortly after the adoption of the State's EA program, respondents brought this class action against the Illinois Department of Public Aid and its director in the United States District Court for the Northern District of Illinois. The state defendants joined the Secretary as a party defendant.

Respondents' principal contention was that the eligibility restrictions and coverage limitations of the State's EA program violated the Social Security Act.[3] They asserted that an EA program *must* furnish benefits to all persons to whom benefits *may* be paid under Section 406(e)(1), *i.e.*, to all "needy families with children" as therein defined, and therefore that the State's restriction of eligibility to persons also eligible for AFDC benefits was invalid. Similarly, respondents argued that benefits under an EA program *must* be paid in all situations in which such benefits *may* be paid under Section 406(e)(1), *i.e.*, whenever the child is without available resources and the payment of benefits is necessary to avoid destitution of the child (or to provide living arrangements for the child), and therefore that the State's limitation of coverage to particular kinds of emergencies

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[3] Respondents also raised arguments under the Illinois Public Aid Code and the Fourteenth Amendment (Pet. App. 25A-26A).

was invalid. Respondents requested declaratory and injunctive relief, including an order requiring expedited processing of claims for EA benefits (Pet. App. 26A).

The district court sustained the validity of the eligibility restrictions and coverage limitations of the State's EA program (Pet. App. 50A-51A).[4] The court of appeals reversed (Pet. App. 25A-40A), reasoning that Section 402(a)(10) of the Act, 42 U.S.C. (Supp. V) 602(a)(10), which requires that AFDC benefits "shall * * * be furnished * * * to all eligible individuals," should be read as imposing a like requirement with respect to EA benefits as well, and that the definition of "emergency assistance to needy families with children" set forth in Section 406(e)(1) thereby establishes mandatory federal standards of eligibility and coverage that may not be narrowed by the states. According to the court of appeals, the State was required either to discontinue its EA program altogether or to provide EA benefits to all "needy families with children" in all emergency situations posing the risk of destitution (Pet. App. 38A-39A). The case was remanded to the district court for entry of appropriate relief.

Shortly after the court of appeals' decision, the State informed the Secretary that it had elected to terminate its EA program (App. 59-64). The Secretary and the state defendants thereafter moved in the district court to have respondents' complaint dis-

[4] The district court agreed with respondents, however, that the State was not processing EA claims rapidly enough (Pet. App. 52A-53A). The State did not appeal from this ruling.

missed on the ground that the State's termination of its EA program had rendered the case moot (Pet. App. 7A). The court granted the motions and dismissed the complaint (Pet. App. 24A).

The court of appeals again reversed (Pet. App. 1A-23A). After the State had terminated its EA program, it had added to its AFDC program a provision for emergency aid that prescribed eligibility restrictions and coverage limitations essentially identical to those of the terminated EA program (Pet. App. 9A); like other state AFDC expenditures, the cost of providing such assistance was reimbursed by the Secretary pursuant to his authority under Section 403(a)(1) of the Act, 42 U.S.C. 603(a)(1). The court of appeals held, however, "that Section 403(a)(5) [governing reimbursement for EA programs] is the exclusive provision for federal funding of emergency needs" (Pet. App. 13A) and that reimbursement was not available under Section 403(a)(1) (governing reimbursement for AFDC programs). Accordingly, the court concluded that, as a matter of law, the emergency assistance portion of the State's AFDC program was a continuation of the invalidated EA program and therefore that respondents' attacks on the validity of the latter program were not moot (Pet. App. 10A, 18A).

The court of appeals remanded to the district court with instructions to enter judgment in accordance with respondents' proposed final judgment, with certain modifications noted in its opinion (Pet. App. 20A-23A). Judgment was duly entered by the district court, enjoining the Secretary "from approving state

plans for emergency assistance which limit eligibility more narrowly than § 406(e) of the Act or funding an emergency assistance program (however designated) under any provision of the Act other than §§ 406(e) and 403(a)(5)" (Pet. App. 71A). The court's order further requires the Secretary to promulgate regulations conforming with the court of appeals' opinions (Pet. App. 71A-72A).[5]

SUMMARY OF ARGUMENT

I. This case requires consideration of two distinct programs operated under Title IV-A of the Social Security Act—the program of "aid to families with dependent children" ("AFDC"), and that of "emergency assistance to needy families with children" ("EA").

A. 1. Nothing in the Act limits AFDC to fixed monthly payments; special additional payments may be made as the needs and circumstances of individual families may require. Regulations have authorized AFDC payments for special needs at least since 1949. The Secretary regularly has approved AFDC programs providing for special emergency benefits and has reimbursed state payments of such benefits under Section 403(a)(1) of the Act, which governs reimbursement of AFDC expenditures. The Secretary's well-established interpretation and consistent practice are entitled to great weight.

2. It cannot be inferred from the 1968 amendment to Title IV-A, which added the EA program and au-

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[5] The Secretary has submitted proposed regulations to the district court.

thorized the Secretary to reimburse EA expenditures under Section 403(a)(5), either that the Secretary previously had lacked authority to reimburse AFDC emergency benefits or that Congress intended to repeal that authority.

a. The 1968 amendment does not indicate a previous lack of authority to reimburse AFDC emergency benefits. The effect of the 1968 amendment was not to enable the states to pay an entirely new kind of benefit, but rather to enable them to extend emergency payments to a new class of beneficiaries. AFDC benefits were payable only with respect to "dependent" children, *i.e.*, children who had been "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent." Section 406(a) of the Act. Congress was concerned about families ineligible to receive AFDC benefits but who nevertheless become destitute due to emergency circumstances. It met that concern by making EA benefits payable without regard to whether the child has been deprived of parental support, *i.e.*, by making EA benefits payable to persons not eligible for AFDC benefits as well as to AFDC beneficiaries. See Section 406(e)(1) of the Act. Thus EA benefits may be paid to a family facing destitution as a result of a natural disaster even if both parents live with the child and the father is employed, whereas AFDC emergency benefits are not payable to such a family.

b. Nor did the 1968 amendment effect a repeal of the Secretary's authority to reimburse AFDC emergency benefits under Section 403(a)(1). Nothing in

the statutory text or legislative history suggests that Congress intended to reduce the Secretary's authority under that provision. There is no evidence that Congress intended to bar reimbursement of AFDC emergency benefits, whether as a means of coercing the states into adopting more comprehensive EA programs or for any other reason. Moreover, if Congress had intended to force the states to adopt EA programs, it could have done so directly; instead, the program was explicitly left optional, and only 27 states have adopted it.

B. Since the State's AFDC emergency benefits lawfully were reimbursed by the Secretary under Section 403(a)(1) rather than under Section 403(a)(5), the court of appeals erred in treating the State's payment of such benefits as the operation of a *de facto* EA program.

There are, moreover, significant differences between the AFDC and EA programs that refute any suggestion that AFDC emergency benefits are merely EA benefits in disguise. AFDC benefits may be paid without limitation as to time; EA benefits may be paid only "for a period not in excess of 30 days in any 12-month period." Section 406(e)(1) of the Act. There are differences between the work, age, income, and other requirements of the two programs that may affect particular families' eligibility for benefits. Compare Section 406(a) and (b) with Section 406(e)(1). The rate of federal reimbursement also may differ significantly as between the two programs. Compare Section 403(a)(1) with Section 403(a)(5).

In view of these differences, the State's termination of its EA program and its decision to pay AFDC emergency benefits instead was not a mere formality. Accordingly, respondents' challenge to the State's EA program is moot.

II. The Secretary's regulations recognize that states that adopt EA programs need not provide benefits to all needy families with children or in all circumstances where necessary to avoid destitution. States have relied upon this construction of the Act to restrict eligibility under, or limit coverage of, their EA programs. The Secretary's interpretation appears to have been accepted by Congress and is entitled to great weight.

Nothing in either Section 403(a)(5) or Section 406(e) requires a state to choose between paying EA benefits to all "needy families with children" (Section 406(e)(1)) or to none, or between making such payments in all emergency circumstances where "necessary to avoid destitution of [the] child" (*ibid.*) or in no emergencies at all. Nor does Section 402(a), which specifies the necessary content of the state plans governing AFDC and EA programs, impose such a requirement. Section 402(a)(10), upon which the court of appeals relied, by it terms applies only to AFDC programs.

The legislative history reveals that Congress intended that the states retain flexibility in devising programs of emergency relief. Moreover, Congress projected that the EA program would involve modest expenditures of public funds, less than would appear

necessary for the expansive program envisioned by the court of appeals.

III. Even if the court of appeals was correct in its view of the merits of this case, the court abused its discretion in ordering nationwide relief.

An equitable remedy should be no more burdensome on the defendant than is necessary to provide complete relief to the plaintiffs. Any injuries to respondents could have been fully redressed by statewide relief.

Many states that had no occasion to appear before the court of appeals would be adversely affected by the entry of nationwide relief: pursuant to that relief, the Secretary apparently would be required to treat all emergency benefits, even those paid under AFDC programs, as if they were EA programs, and then to terminate reimbursement for each EA program that the participating state refused to expand to the maximum extent allowable under Section 406(e)(1).

The unnecessary granting of nationwide relief against federal officers places undue burdens on this Court, for holdings that might not warrant this Court's immediate review if relief had been narrowly tailored inevitably assume greater significance when the relief requires revision in the nationwide administration of a federal program.

Finally, the order against the Secretary, which requires him to submit proposed regulations to the district court for approval and to promulgate the regulations as approved, constitutes a "forbidden judicial intrusion into the administrative domain." *Arrow*

Transportation Co. v. *Southern Ry. Co.*, 372 U.S. 658, 670. Where, as here, the governing statute itself does not require the administrator to issue regulations, the courts are without power to order him to do so. And even if the statute did require issuance of regulations, supervision of their promulgation would not be an appropriate task for the judiciary.

ARGUMENT

I

THE SECRETARY HAS AUTHORITY UNDER SECTION 403(a)(1) OF THE SOCIAL SECURITY ACT TO REIMBURSE AMOUNTS EXPENDED BY THE STATES IN PROVIDING EMERGENCY "AID TO FAMILIES WITH DEPENDENT CHILDREN" WITHIN THE MEANING OF SECTION 406(b) OF THE ACT

Title IV-A of the Social Security Act, 42 U.S.C. (and Supp. V) 601 *et seq.*, authorizes federal payments to the states "[f]or the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives * * *." Section 401 of the Act, 42 U.S.C. 601. Federal payments are made to those states that adopt a "plan for aid and services to needy families with children" that satisfies the requirements of Section 402(a) of the Act, 42 U.S.C. (Supp. V) 602(a), and is approved by the Secretary of Health, Education, and Welfare under Section 402(b) of the Act, 42 U.S.C. 602(b).

The principal Title IV-A program is that of "aid to families with dependent children" ("AFDC"), which is defined in Section 406(b) of the Act gen-

erally to mean "money payments with respect to * * * a dependent child or dependent children." In turn, "dependent child" is defined in Section 406(a), 42 U.S.C. 602(a), to mean "a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living [in the home of a relative], and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one [if a student]."[6] The amount of AFDC benefits paid to individual families is determined by the state, subject only to general guidelines set forth in Section 402(a) of the Act. State AFDC program expenditures are reimbursed by the federal government in accordance with the formula prescribed by Section 403 (a)(1).[7]

In 1968, Title IV-A was amended (81 Stat. 893) also to authorize federal reimbursement of state programs of "emergency assistance to needy families with children" ("EA"), which is defined in Section 406(e)(1) to mean assistance to "a needy child under the age of 21 who is * * * living with * * * relatives * * *, but only where such child is without available resources [and] the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such

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[6] The term "dependent child" also may include, in certain circumstances, a child who has been "deprived of parental support or care by reason of the unemployment * * * of his father." Section 407(a) of the Act, 42 U.S.C. 607(a).

[7] Reimbursement to Puerto Rico, the Virgin Islands, and Guam is determined by reference to the formula set forth in Section 403(a)(2), 42 U.S.C. 603(a)(2).

child * * *." As is also true with respect to AFDC, the amount of EA benefits paid to individual families is determined by the states. Under Section 403(a)(5), the federal government reimburses 50 percent of state EA program expenditures.

This case arose as a challenge to the eligibility and coverage provisions of the EA program adopted by the State of Illinois in 1973. The State subsequently terminated its EA program, for which it had received federal reimbursement pursuant to Section 403(a)(5); in place of that program, the State began paying emergency benefits under its AFDC program, subject to essentially the same eligibility restrictions and coverage limitations, and receiving federal reimbursement for those payments pursuant to Section 403(a)(1). The court of appeals held that this did not render the challenge to the State's EA program moot.

The court reasoned that AFDC emergency benefits in fact constitute EA benefits, and it concluded that the State's payment of AFDC emergency benefits amounted to the operation of a *de facto* EA program that was subject to the same challenge that respondents had made to the State's former *de jure* EA program. The court acknowledged that this conclusion was "founded on the premise that Section 403(a)(5) is the exclusive provision for federal funding of emergency needs under [Title IV-A]" (Pet. App. 13A), *i.e.*, that state payment of AFDC emergency benefits may not be reimbursed under Section 403(a)(1), which governs AFDC reimbursement, but only under

Section 403(a)(5), which governs EA reimbursement.

The court's premise was incorrect: the states may, as part of their AFDC programs, pay emergency benefits, and those payments are reimbursable by the federal government under Section 403(a)(1), the same authority that governs reimbursement of other AFDC payments. Moreover, the AFDC and EA programs are different in the implications for beneficiaries, for participating states, and for the federal government; accordingly, Illinois' payment of emergency benefits under its AFDC program did not constitute a *de facto* EA program, nor was it a sham or a subterfuge for continuing an EA program under a different name. Since the State's EA program in fact has been terminated, respondents' challenge to that program is moot.

A. AFDC Benefits May Cover Special Emergency Needs

1. Nothing in Title IV-A precludes the states from making additional payments to AFDC beneficiaries to cover special emergency needs. "Aid to families with dependent children" is defined broadly to cover all "money payments"; it therefore is not limited to fixed monthly payments but instead may include special additional payments as the needs and circumstances of individual families may require.

This basic principle has long been recognized by the Secretary and acted upon by the states. The Secretary's regulations permit the states to include

assistance with respect to "special need items" in their AFDC programs. 45 C.F.R. 233.20(a)(2)(v). This permission has been explicit at least since 1949. See Federal Security Agency, *Handbook of Public Assistance Administration*, Part IV, Section 3131 (February 14, 1949).

Although "special need items" has not been specifically defined by the Secretary, it has been well understood that the term includes benefit payments designed to meet emergency needs.[8] The only limitation imposed by the Secretary has been that "the circumstances * * * [giving rise to the 'special need' payments] must be such as to necessitate expenditures not necessary for all individuals." Department of Health, Education, and Welfare, *Handbook of Public Assistance Administration*, Part IV, Section 3131(3) (February 23, 1966). Accordingly, the Secretary has approved state AFDC programs covering, for example, emergency needs arising from catastrophe or natural disaster, emergency child care, and other similar special emergency needs. As of January 1977, the AFDC programs of 45 states covered various special need items (Pet. App. 78A).[9]

In short, the Secretary consistently has construed "aid to families with dependent children" to include

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[8] The term also includes payments for nonemergency needs peculiar to the individual, such as the cost of special therapeutic diets.

[9] As of January 1977, twenty-three of those states had not adopted an EA program (Pet. App. 78A-79A).

payments of emergency benefits to AFDC recipients. In accordance with that construction of the statute, such payments have been reimbursed under Section 403(a)(1), the provision governing reimbursement of AFDC expenditures. This longstanding interpretation of the Social Security Act by the agency charged with its administration is entitled to great weight. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16.

2. The court of appeals, however, inferred from the 1968 amendment to Title IV-A, which authorized the Secretary, under Section 403(a)(5), to reimburse state EA benefit payments that the Secretary lacked any separate authority to reimburse state AFDC emergency benefit payments. Apparently the court believed that the 1968 amendment indicated either that previously there had been no authority to reimburse any kind of emergency benefits or that any such authority had been repealed by implication. But the 1968 amendment supports neither proposition.

a. The 1968 amendment does not show that the Secretary theretofore had lacked authority to reimburse AFDC emergency benefits. The effect of the 1968 amendment was not to enable the states to pay an entirely new kind of benefit, but rather to enable them to pay emergency benefits to a new class of beneficiary.

As we have shown above (pp. 15-17, *supra*), before 1968 the Secretary had authority, under Section 403(a)(1), to reimburse the states for their payment of emergency benefits, but only when those benefits were paid to AFDC beneficiaries. The prob-

lem faced by Congress, in considering new legislative proposals in 1967, was how to enlarge the class of persons to whom the states would be permitted to pay federally reimbursable emergency benefits without at the same time significantly extending the scope of the basic AFDC program.

Congress was concerned about families who did not satisfy the statutory definition of "families with dependent children" but nevertheless confronted the risk of destitution due to short-term emergency circumstances. President Johnson's 1967 proposals for changes in the Social Security Act had included a recommendation for federally assisted emergency benefits to migratory workers, who generally were ineligible for AFDC assistance because of state durational residency requirements. See "President's Proposals for Revision of the Social Security System," Hearings on H.R. 5710 before the House Committee on Ways and Means, 90th Cong., 1st Sess. 64 (1967) (hereinafter cited as "House Hearings"); "Social Security Amendments of 1967," Hearings on H.R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess. 270 (1967) (hereinafter cited as "Senate Hearings"). Cf. *Shapiro* v. *Thompson*, 394 U.S. 618. During the course of legislative consideration of the proposals, this recommendation was broadened to include emergency benefits to other needy families with children as well. House Hearings, *supra*, at 847-848; Senate Hearings, *supra*, at 270.[10] Congress agreed

[10] Wilbur J. Cohen, Under Secretary of Health, Education, and Welfare, testified that "[t]here is no mechanism in the

that it was necessary to "provide more flexible and appropriate tools" to "assure needed care for children." S. Rep. No. 744, 90th Cong., 1st Sess. 165 (1967). See also H.R. Rep. No. 544, 90th Cong., 1st Sess. 109, 181 (1967); 113 Cong. Rec. 32853 (1967) (statement of Senator Ribicoff). As the Senate Committee on Finance noted (S. Rep. No. 744, *supra* at 165):

> In the event of eviction, or when utilities are turned off, or when an alcoholic parent leaves children without food, immediate action is necessary.

Senator Mansfield further elaborated (113 Cong. Rec. 36925 (1967)):

> Families with emergency trouble will be able to receive emergency assistance in whatever form it is best for them at their time of need. Families which have been burned out, suffered personal tragedies and such will be able to get money, medical care, shelter provided, food sent in, or whatever else is needed to deal with the crisis.

See also H.R. Rep. No. 544, *supra*, at 96-97, 109; 113 Cong. Rec. 23054 (1967) (statement of Representative Mills).

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existing Federal law to meet the special needs of children which may arise in a crisis situation." Senate Hearings, *supra*, at 270. But it is clear from the context that Mr. Cohen was referring to children in families not receiving AFDC assistance, for he was concerned with persons "excluded from State and local public assistance programs" and indicated that "[w]hat we are * * * asking is for a * * * period of time that would permit the State welfare agency to undertake handling that child in that family in a responsible way." *Ibid.*

The result was an entirely new general program of emergency benefits, the principal purpose of which was to permit special emergency payments to be made to persons not eligible for AFDC assistance. See S. Rep. No. 744, *supra*, at 4, 146; H.R. Rep. No. 544, *supra*, at 4, 113; 113 Cong. Rec. 23054 (statement of Representative Mills), 32592 (statement of Senator Long) (1967).[11] The new amendment added to the Social Security Act both Section 403(a)(5), which authorizes the Secretary to reimburse 50 percent of state expenditures for "emergency assistance to needy families with children," and Section 406(e), which defines that term so as to permit EA benefits to be paid to families who are not eligible for AFDC benefits. See pp. 12-14, *supra*. Thus, whereas AFDC benefits may be paid only with respect to a "dependent child," "who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent" (Section 406(a), (b)), EA benefits may be furnished without regard to whether the child has been deprived of parental support. Compare Sec-

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[11] Senator Curtis observed that "[f]or the first time, the Federal Government will match money for emergency assistance." 113 Cong. Rec. 36319 (1967). However, he then clarified that he was referring to "emergency assistance * * * paid in cases where [the recipients] cannot meet other qualifications [such as eligibility for AFDC]." *Ibid.* Contrary to the apparent understanding of the court of appeals (Pet. App. 15A-16A), therefore, Senator Curtis' remarks are not indicative of a belief that reimbursable emergency assistance had not theretofore been payable to AFDC recipients.

tion 406(a) with Section 406(e)(1). For example, EA benefits may be paid where a natural disaster leaves a family destitute, even if both parents are living in the home and the father is employed; such a family is not eligible for AFDC benefits.

It therefore is clear that the court of appeals below misconstrued the significance of the 1968 amendment. That amendment was necessary not for the purpose of authorizing reimbursements of special payments made to AFDC beneficiaries in emergency circumstances, but rather in order to authorize reimbursement of similar payments made to persons not eligible for AFDC.[12] Accordingly, it cannot be inferred from the 1968 amendment that the Secretary previously had lacked authority under Section 403(a)(1) to reimburse AFDC emergency benefits.

b. Nor can it be inferred that Congress repealed the Secretary's authority under Section 403(a)(1) to make such reimbursement. Certainly nothing in the text of the 1968 amendment purported to terminate the Secretary's authority to make reimbursement for AFDC payments, including payments for special emergency needs, under Section 403(a)(1). The court of appeals apparently believed, however, that its holding that AFDC emergency benefits may not be reimbursed pursuant to that authority was necessary to

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[12] Of course, the classes of potential beneficiaries described in Section 406(a) and (e) overlap, so that emergency benefits may be paid under the EA program to families also eligible for AFDC benefits.

effectuate its earlier decision (Pet. App. 25A-40A) that Section 406(e)(1) requires states adopting EA programs to pay emergency benefits to all "needy families with children" in all circumstances posing a risk of destitution. The court stated that if a state were permitted to pay emergency benefits under its AFDC program to only a portion of those families to whom benefits were payable under Section 406(e)(1), "the requirements of Section 406(e)(1) would be totally eviscerated" (Pet. App. 18A). The court seemingly reasoned that Congress intended to bar the states from paying AFDC emergency benefits as a means of coercing them into adopting comprehensive EA programs.[13]

As we explain below (pp. 28-35, *infra*), the court's premise for this line of reasoning, its reading of Section 406(e)(1), is incorrect: Congress has not required states adopting EA programs to pay benefits to all "needy families with children" or in all circumstances posing a risk of destitution. But even if the contrary were assumed, there nevertheless would be no basis for supposing that Congress sought to induce the states to adopt EA programs by barring them from paying AFDC emergency benefits.

First, nothing in the statute or its legislative history suggests that Congress intended to reduce in any way the scope of state AFDC programs. In par-

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[13] It is clear, however, that Congress did not intend the EA program to be the only federally assisted program that would provide emergency benefits for children. See, *e.g.*, Section 1119 of the Act, 42 U.S.C. 1319 (emergency home repairs).

ticular there is no indication whatsoever that Congress sought to require the states to discontinue AFDC emergency payments. Second, if Congress had wanted to apply coercive pressure against the states, it could have done so directly, for example by requiring participation in the EA program as a condition for reimbursement under the AFDC program. See, *e.g.*, Section 402(a)(27) of the Act, 42 U.S.C. (Supp. V) 602(a)(27) (requiring participation in the child support and establishment of paternity program as a condition of AFDC and EA reimbursement). But Congress did not do so. Instead, it left participation in the EA program entirely optional with the states; indeed, as of January 1977, only 27 states participated in the program (Pet. App. 78A). And there is no evidence that Congress intended to do indirectly what it quite plainly chose not to do directly. In short, Congress never intended to repeal the Secretary's authority under Section 403(a)(1) to reimburse the AFDC emergency benefits paid even by those states that do not participate in the EA program, and it did not effect such a repeal by implication

B. AFDC Emergency Benefits Are Not Merely EA Benefits in Disguise

In holding that respondents' challenge to Illinois' EA program was not moot, the court of appeals reasoned that since the AFDC emergency benefits paid by the State were reimbursable only under Section 403(a)(5), governing the EA program, by definition they constituted EA benefits. But since, as we have

just shown, AFDC emergency benefits properly may be reimbursed under Section 403(a)(1) governing the AFDC program, that definitional equivalence does not hold. We now proceed to show that neither is there a practical equivalence between the two benefit programs: AFDC emergency benefits are not merely EA benefits in disguise.

Payments under an EA program, unlike those under an AFDC program, may be made to needy families with children who have not been deprived of parental support (see pp. 20-21, *supra*). But the two programs are marked by many other significant differences as well.

The most important of these differences pertains to the length of time during which benefits may be paid. In enacting the EA program, Congress was concerned solely with assisting the states in dealing with short-term family emergencies. See, *e.g.*, S. Rep. No. 744, *supra*, at 165-166; H.R. Rep. No. 544, *supra*, at 109. For that reason, emergency benefits may be paid under the EA program to needy families with children, without reference to AFDC eligibility requirements, but only "for a period not in excess of 30 days in any 12-month period." Section 406(e)(1) of the Act.[14] In contrast, there is no durational limitation on the payment of AFDC emergency benefits. For example, when the State in this case terminated its EA program and added a provision for emergency bene-

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[14] The Secretary, however, reimburses "payments which are to meet needs which arose before such 30-day period or are for such needs as rent which extend beyond the 30-day period." 45 C.F.R. 233.120(b)(3).

fits to its AFDC program, it "removed the restriction limiting special assistance payments to once in any 12 consecutive months" (Pet. App. 12A, n. 6). Thus a state's choice between AFDC and EA as the vehicle for furnishing emergency benefits could have a significant impact even upon persons who would be eligible for assistance under either program.

A number of other differences between the two programs could affect particular potential beneficiaries. Although work requirements are imposed with respect to each program, under the AFDC program failure to meet the requirement does not bar payments for the support of the child, whereas under the EA program failure to meet the requirement terminates eligibility for all members of the family. Compare Section 402 (a)(19)(F), 42 U.S.C. (Supp. V) 602(a)(19)(F), with Section 406(e)(1). Whereas AFDC benefits can be paid only while the dependent child is living with relatives (or in a foster home), EA benefits may be paid if the child was living with relatives within six months prior to the month for which assistance is requested. Compare Section 406(a)(1) and 45 C.F.R. 233.110 with Section 406(e)(1) and 45 C.F.R. 233.120 (b)(1)(i). EA benefits may be provided to all otherwise eligible children under the age of 21, whereas AFDC benefits may be furnished to children between the ages of 18 and 21 only if they are students. Compare Section 406(e)(1) with Section 406(a)(2), 42 U.S.C. 606(a)(2). Finally, EA benefits may be furnished to families whose income exceeds AFDC eligibility levels, provided "the payments, care, or services involved are necessary to avoid destitution of

[the] child or to provide living arrangements in a home for such child." Section 406(e)(1).

Moreover, even if the amounts paid to individual families were unaffected, the choice between an EA program and an AFDC program could have significant fiscal implications for the participating state and the federal government. Federal reimbursement of state AFDC payments is determined in accordance with the formula prescribed by Section 403(a)(1) of the Act, which provides for federal reimbursement of not more than 83⅓ percent and, as a practical matter, not less than 50 percent of a state's AFDC expenditures. See also Section 1101(a)(8) of the Act, 42 U.S.C. 1301(a)(8).[15] In contrast, federal reim-

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[15] The court of appeals mistakenly believed that reimbursement of AFDC emergency benefits under Section 403(a)(1) would reduce the amount of federal funds made available for other AFDC payments (see Pet. App. A14-A15). Section 401 of the Act authorizes appropriation of a "sum sufficient to carry out the purposes" of Title IV-A and provides that the monies "made available under this section shall be used for making payments to States" with approved plans. In turn, Section 403(a)(1) requires that the Secretary of the Treasury "shall pay" to the states the amounts calculated according to the formula therein prescribed. There is no authorization ceiling that limits total federal reimbursement in a way that would require a reduction in federal reimbursement of other AFDC benefits in order to accommodate the reimbursement of AFDC emergency benefits.

Moreover, appropriation acts for Title IV-A do not distinguish between AFDC and EA programs. See, *e.g.*, Pub. L. 94-439, 90 Stat. 1418, 1429. Expenses incurred under one program therefore would be as readily reimbursed as those incurred under the other. Furthermore, the appropriations acts provide, in effect, open-ended appropriations. For example, in

bursement of state EA expenditures is provided under Section 403(a)(5), at a flat rate of 50 percent.[16]

In sum, there are several substantial differences between the AFDC and EA programs, differences that affect beneficiaries, the participating states, and the federal government. In view of these differences, it is plain that a state's payment of AFDC emergency benefits does not constitute the operation of a *de facto* EA program. Thus respondents' challenge to Illinois' EA program became moot when that program was terminated, notwithstanding the State's subsequent decision to pay AFDC emergency benefits.

Pub. L. 94-439, 90 Stat. 1418, 1429, funds from the Fiscal Year 1977 appropriation may be used to fund any deficiencies carried over from Fiscal Year 1976. The Congress to date has always appropriated funds to meet such deficiencies.

[16] States participating in the medicaid program under Title XIX of the Act, however, alternatively may substitute the medicaid reimbursement formula prescribed by Section 1905(b) of the Act, 42 U.S.C. (Supp. V) 1396d(b), to determine the total reimbursement to which they are entitled under Sections 3(a), 403(a), 1003(a), 1403(a), and 1603(a) of the Act, 42 U.S.C. (and Supp. V) 303(a), 603(a), 1203(a), 1353(a), and 1383(a). See Section 1118 of the Act, 42 U.S.C. 1318. Under the medicaid reimbursement formula, "the Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum." Section 1905(b) of the Act. Thus in those circumstances in which it is advantageous to a state to use the alternative medicaid reimbursement formula, the same reimbursement percentage will apply to its AFDC and EA programs.

II

STATES THAT ELECT TO PROVIDE "EMERGENCY ASSISTANCE TO NEEDY FAMILIES WITH CHILDREN," WITHIN THE MEANING OF SECTION 406(e)(1) OF THE ACT, ARE NOT REQUIRED BY THE ACT TO FURNISH SUCH ASSISTANCE TO ALL SUCH FAMILIES IN ALL CIRCUMSTANCES POSING THE RISK OF DESTITUTION

Shortly after Congress added Sections 403(a)(5) and 406(e) to the Social Security Act, authorizing federal reimbursement of state EA expenditures, the Secretary issued interim regulations that provided that states participating in the EA program were free to specify the conditions of eligibility for EA benefits. 33 Fed. Reg. 10229. These regulations were made permanent on January 10, 1969 (45 C.F.R. 233.120; 34 Fed. Reg. 393), and have remained in force, without any amendment in this respect, since that time. The Secretary's regulations therefore "involve[ ] a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315. As such, they are entitled to great weight. See *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408.

At least some of the states that have adopted EA programs have relied upon these regulations to restrict eligibility to a class of beneficiaries that excludes some "needy families with children," within the meaning of Section 406(e)(1), or denies coverage in some emergency circumstances posing the risk of destitu-

tion (see Pet. App. 82A).[17] These programs have been approved by the Secretary. Furthermore, during the nine years the regulations have been in effect, and the statute so administered by the Secretary, Congress often has had occasion to consider the statutory scheme and once has amended Section 403(a)(5).[18] Congress has never, however, indicated disapproval of the Secretary's regulations. In these circumstances, the Secretary's long-standing interpretation of the statute, in which Congress appears to have acquiesced, is entitled to judicial deference. *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 421; *Udall* v. *Tallman*, *supra*, 380 U.S. at 16.

The Secretary's interpretation is consistent with the language of the statute. Section 403(a)(5) simply authorizes the Secretary to reimburse state payments of "emergency assistance to needy families with children." Section 406(e) describes such assistance in broad terms (see pp. 13-14, *supra*), setting forth the outside limits of a state's discretion to make reimbursable EA payments. Nothing in either provision requires a state to choose between making such payments either to all "needy families with children" (Section 406(e)(1)) or to none, or between making such payments in all emergency circumstances where

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[17] The Secretary has not yet completed his review of state EA programs to determine whether they comply with the decisions of the court of appeal below.

[18] Section 403(a)(5) was amended by Section 301(c) of the State and Local Fiscal Assistance Act of 1972, 86 Stat. 947, in order to change the reimbursement formula.

"necessary to avoid destitution of [the] child" (*ibid.*) or in no emergencies at all.

Nor is there any such requirement in Section 402 (a), the statutory provision that specifies the conditions that must be satisfied before the Secretary may approve a state "plan for aid and services to needy families with children," *i.e.*, the plan that covers both the state's AFDC program and, if one has been adopted, its EA program. Most of the requirements set forth in Section 402(a) apply equally to AFDC and EA programs; some, however, and in particular the requirement in Section 402(a)(10) that benefits be furnished "to all eligible individuals," by their terms apply only to the AFDC program. No requirement applicable to the EA program requires benefits to be paid to all persons to whom such benefits could be paid under Section 406(e)(1).

The court of appeals nevertheless concluded that "Congress intended the eligibility provisions of Section [4]06(a) to be mandatory on the states" (Pet. App. 37A). The court rested its analysis on Section 402(a)(10), which, the court acknowledged (*ibid.*), by its terms pertains only to "aid to families with dependent children" (the AFDC program) and not to "emergency assistance to families with needy children" (the EA program). The court noted that Section 402(a)(10) requires that state AFDC programs cover all families described in Section 406(a) (see *Carleson* v. *Remillard*, 406 U.S. 598; *Townsend* v. *Swank*, 404 U.S. 282; [19] *King* v. *Smith*, 392 U.S. 309)

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[19] In a decision subsequent to the one below, the Second Circuit, apparently without observing that Section 402(a)(10)

and concluded that "[t]he close relationship between Sections [4]02(a) and [4]06(e) leads us to believe that Congress intended that Section [4]06(e) be treated in the same way as Section [4]06(a), which also is closely related to Section [4]02" (Pet. App. 37A).[20]

"This departure from ordinary principles of statutory interpretation is not supported by [this] Court's prior decisions." *Burns* v. *Alcala*, 420 U.S. 575, 580. Although the EA program and the AFDC program both are programs of "aid and services to needy

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applies only to the AFDC program, relied upon *Townsend* v. *Swank*, *supra*, in concluding that once a state adopts an EA program, it is "bound to follow the eligibility conditions established by federal law." *Lynch* v. *Philbrook*, 550 F. 2d 793, 795-796.

[20] The court also thought that other provisions of Section 402(a) that by their terms apply only to AFDC "must apply to Section [4]06(e)" (Pet. App. 37A). The court referred in particular to the "fair hearing" provision of Section 402(a)(4) and the "reasonable promptness" provision of Section 402(a)(10). But the statute need not be stretched beyond its language in the wholesale manner that the court of appeals suggests. A disapointed applicant for EA benefits is entitled to a fair hearing, not, however, because of Section 402(a)(4), but under the Secretary's regulations. See 45 C.F.R. 205.10. Cf. *Goldberg* v. *Kelly*, 397 U.S. 254. Similarly, the Secretary has determined that applications for EA benefits must receive a faster response by state agencies than the "reasonable promptness" with which AFDC benefits must be paid; under the Secretary's regulations, EA benefits must be paid to eligible applicants "forthwith." 45 C.F.R. 233.120(a)(5).

The court mistakenly believed that the reporting requirement of Section 402(a)(6) by its terms also applied only to AFDC (Pet. App. 37A). That requirement applies to all aspects of the state "plan for aid and services to needy families with children;" it is not limited to the AFDC program.

families with children," within the meaning of Section 402(a), that is an insufficient reason for treating them alike when Section 402(a) itself does not do so. They are separate and distinct programs, and where Congress, in setting requirements in Section 402(a), has chosen to distinguish between them, that choice should be respected by the courts. Section 402(a)(10), unlike most provisions of Section 402(a),[21] explicitly is made applicable only to "aid to families with dependent children," and the mandatory eligibility requirement it imposes thereby covers only AFDC programs. Section 402(a) does not impose any mandatory eligibility requirements with respect to EA programs. See *Williams* v. *Wohlgemuth*, 540 F. 2d 163, 168-169 (C.A. 3).[22]

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[21] For example, the requirement in Section 402(a)(1) that the state plan "be in effect in all political subdivisions of the State" applies to all programs covered by the plan, including the EA program where it has been adopted. The court of appeals noted that Section 406(e)(2) partially exempts EA programs from that requirement, and it inferred from that explicit exemption that EA programs are not exempt from any other requirements of Section 402(a) (Pet. App. 37A). But that inference is sound only with respect to requirements that, like that of Section 402(a)(1), by their terms apply to the EA program. Section 406(e)(2) affords no basis for an inference that EA programs are subject to requirements that by their very terms are applicable only to the AFDC program.

[22] The Third Circuit in *Williams* nevertheless inferred from the states' discretion to determine "the amount of time during which the aid will be available, the kinds of aid to provide, and whether to include in the program migrant workers with families" that Congress did not intend to allow them any further discretion, including that of imposing "eligibility stan-

Furthermore, the legislative history is devoid of any suggestion that Congress intended to require participating states to provide the expansive EA relief that the court below has ordered. To the contrary, as we have indicated (p. 19, *supra*), the House and Senate Reports both explicitly endorsed the purpose of giving the states flexibility to deal with the emergency needs of children. It follows that Congress intended the states to retain the freedom to choose their own eligibility standards and coverage limitations, subject only to the proviso that the federal government would not reimburse payments made to persons other than "needy families with children," or payments not "necessary to avoid destitution * * * or to provide living arrangements in a home." Cf. *Batterton* v. *Francis*, No. 75-1181, decided June 20, 1977.

This view of the statute also is consistent with Congress' estimates of the projected cost of funding state EA programs. The House Committee on Ways and

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dards more confining than those contained in the federal statute" (540 F. 2d at 169). But that analysis fails for two reasons. First, it is clear that substantial further discretion is implicitly granted to the states under Section 406(e)(1), including in particular broad discretion to set the level of funding; thus it cannot be persuasively argued that the states retain no more discretion than is explicitly granted. Second, the thrust of Section 406(e) is descriptive; it describes the outer limits of the emergency relief for which the states may be reimbursed. The "discretion" explicitly granted, which really includes only the discretion to provide care and services as well as money payments and to include nonresident migrant workers, was made explicit simply to assure the states that they would be reimbursed for such expenditures if they chose to make them.

Means estimated that the annual cost would be approximately $35 million. 113 Cong. Rec. 23058 (1967).[23] This amount almost certainly would be insufficient for the expansive EA program envisioned by the court of appeals, under which payments would be made to all "needy families with children" wherever "necessary to avoid destitution." [24]

Other evidence in the legislative history also suggests that Congress did not intend a comprehensive and expensive program. A major feature of the Social Security Amendments of 1967 was the so-called "welfare freeze." See Section 208 of Pub. L. 90-248, 81

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[23] In fact, the federal share of the EA program has cost less than Congress anticipated. For example, in Fiscal Year 1972, the year to which the House Committee's estimate applied, federal EA payments amounted to only $22 million. Division of Finance, Department of Health, Education, and Welfare, *Fiscal Year 1972, State Expenditures for Public Assistance Programs Approved Under Titles I, IV-A, X, XIV, and XIX of the Social Security Act*, p. 34 (1972). This amount provided benefits for an average of 19,000 families per month. Department of Health, Education, and Welfare, National Center for Social Statistics, *Report No. A-2* (June 1972) at Table 3. By extrapolation from that figure, it would appear that Congress contemplated coverage of no more than about 30,000 families per month when the program was fully operational in 1972. Thus Congress believed that the EA program would be small as compared with the AFDC program, which provided assistance to more than 10 million persons per month in 1972. *Id.* at Table 1.

[24] The elastic phrase "necessary to avoid destitution" may be given an expansive reading indeed. See, e.g., *Application of Bryant* v. *Lavine*, 79 Misc. 2d 425, 359 N.Y.S. 2d 492 (Sup. Ct.); *Matter of Preston* v. *Barbaro*, 61 Misc. 2d 327, 305 N.Y.S. 2d 627 (Sup. Ct.).

Stat. 894, repealed by Section 3 of Pub. L. 91-41, 83 Stat. 45. This provision, which limited the number of children eligible for AFDC in each state, was the subject of considerable debate and received much attention. See, *e.g.*, Senate Hearings, *supra*, at 142-143, 202, 1001; 113 Cong. Rec. 36785-36786 (statement of Senator Kennedy of New York), 36796 (statement of Senator Javits), 36923 (statement of Senator Nelson) (1967). It is very unlikely that Congress, while economizing through the imposition of a highly controversial "welfare freeze," at the same time, without fanfare, would have moved in the opposite and costly direction of imposing mandatory, expansive, eligibility standards on state EA programs.[25]

III

THE COURT OF APPEALS ABUSED ITS EQUITABLE DISCRETION BY ORDERING NATIONWIDE RELIEF ON BEHALF OF A STATEWIDE CLASS

Even if the court of appeals was correct in its view of the merits of this case, the relief ordered is far broader than was necessary to provide respondents with a complete remedy. Any injuries to respondents could have been fully redressed by statewide relief.

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[25] Finally, the added cost of the comprehensive EA program ordered by the court of appeals would be shared by the participating states. It may well be that many states would choose, as two already have done, to terminate their EA programs altogether rather than expand them in a manner that they may regard as prohibitively costly (see Pet. App. 81A-82A). This ironic result would be entirely at variance with the apparent congressional intention of creating a modest, flexible, state-controlled program of emergency relief.

It is a fundamental tenet of equity jurisprudence that injunctions are to be used sparingly. *Irwin* v. *Dixion*, 9 How. 10, 33. As a corollary, when injunctive relief is granted, it should do no more than afford redress to the complaining parties; the remedy should be no more burdensome on the defendant than is necessary to provide complete relief to the plaintiffs. *Dayton Board of Education* v. *Brinkman*, No. 76-539, decided June 27, 1977; *Whitcomb* v. *Chavis*, 403 U.S. 124, 160-161. "The remedial powers of an equity court must be adequate to the task, but they are not unlimited." *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 161. See also *Milliken* v. *Bradley*, 418 U.S. 717.

The order of the court of appeals violates this elementary limitation on the exercise of equitable jurisdiction. Respondents are "Illinois recipients of [AFDC benefits] and the Illinois and Chicago Welfare Rights Organizations" (Pet. App. 25A), and they instituted this litigation solely to challenge the validity of the State of Illinois' EA program (App. 20-24). In other words, respondents represent only a statewide class and challenge only a single state's program. Yet, after concluding that that program was defective, the court of appeals ordered nationwide relief by requiring the Secretary to revise his administration of the Social Security Act on a nationwide basis (Pet. App. 20A-23A). Pursuant to that order, the district court has entered judgment requiring the Secretary to promulgate regulations in accordance with the court of appeals' opinions and en-

joining him "from approving state plans for emergency assistance which limit eligibility more narrowly than § 406(e) of the Act or funding an emergency assistance program (however designated) under any provision of the Act other than §§ 406(e) and 403 (a)(5)" (Pet. App. 71A).

Many states and welfare beneficiaries not parties to this suit may be adversely affected by the entry of nationwide relief. Forty-five states currently include "special need" items as part of their AFDC programs (Pet. App. 78A), and twenty-seven states participate in the EA program (*ibid.*). All of these states would be forced to lie in the procrustean bed made by the court of appeals: the Secretary apparently would be required to treat all emergency benefits, even if designated as AFDC "special need" items, as EA programs, and would be required to terminate reimbursement for each EA program that had not been expanded to the maximum extent allowable under Section 406(e)(1). States paying emergency benefits therefore would be forced to terminate emergency benefit programs unless they chose to enlarge them in a manner that many may regard as prohibitively expensive (see note 25, *supra*).[28]

Of course, that may be the result, as a practical matter, if respondents prevail on all aspects of the merits in this Court. But there is a basic difference

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[28] Moreover, if, as we believe would not be the case, the states were barred from terminating AFDC emergency benefits (cf. *Rosado* v. *Wyman*, 397 U.S. 397), they would have no choice but to provide an expansive EA program.

between nationwide enforcement of a decision of this Court and similar enforcement of a decision by a court of appeals, in a case not involving a nationwide class. Once a case reaches this Court, all interested persons are put on notice that a decision dispositive of their claims may be forthcoming. In this case, for example, interested states know that a final decision by this Court will bind them, and they may, as some in fact have done, file briefs *amicus curiae* to ensure that their views are heard. In contrast, other states, except perhaps those located within the Seventh Circuit, had no occasion to participate in this case at its earlier stages, especially in view of the fact that respondents only requested nationwide relief after they prevailed on the merits in the court of appeals.[27] In these circumstances, the order of nationwide relief was fundamentally unfair to the states not parties to the litigation.[28]

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[27] Respondents' complaint stated that only the Illinois EA program was "at issue" (App. 18). Their proposed final judgment filed with the district court on November 26, 1975, following the court of appeals' decision on the necessary scope of a state EA program, however, asked for broad nationwide relief (App. 54-55).

[28] It is true that since the order binds only the Secretary and the State of Illinois, other states would remain free to challenge the Secretary's enforcement of the order. But judicial relief should not unnecessarily force the federal government and the states into opposing positions. Moreover, litigation arising from state challenges to the Secretary's enforcement of the court's order would raise the possibility of subjecting the Secretary to conflicting court orders.

Furthermore, the unnecessary granting of nationwide relief against federal officers, as in this case, is contrary to sound principles of judicial administration, for its places undue burdens upon this Court. Holdings that might not warrant this Court's immediate review if relief had been narrowly tailored inevitably assume substantially greater significance when the relief requires revision in the nationwide administration of a federal program. Thus the unnecessary granting of nationwide relief by a lower court may have the practical effect of forcing this Court to undertake what otherwise might be viewed as premature consideration of complex and important issues. As Mr. Justice Frankfurter once observed (*Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 918 (respecting the denial of the petition for a writ of certiorari)):

> It may be desirable to have different aspects of of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

Finally, the granting of nationwide relief in this case, in the form of an order against the Secretary, constituted an improper interference with the Secretary's regulatory powers, a "forbidden judicial intrusion into the administrative domain." *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 670. Congress has delegated to the Secretary the authority to determine whether and, if so, what regulations are "necessary to * * * efficient administration." Section

1102 of the Act, 42 U.S.C. 1302.[39] It is inappropriate for a court, by affirmatively ordering a particular exercise of the Secretary's authority to prescribe regulations, to make mandatory what Congress has left discretionary. See *United States ex rel. Redfield* v. *Windom*, 137 U.S. 636, 643-644. Cf. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20-21. It is sufficient for a court to interpret the statutes administered by the Secretary and to order him to follow that interpretation with respect to the parties to the particular litigation; where, as here, the statute itself does not demand regulations, the Secretary should remain free to determine whether regulations are necessary.

Moreover, even where a statute requires the issuance of regulations, supervision of their promulgation is not a judicial function. Cf. *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 112-114; *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 469. Yet it is precisely that function that the courts below have assumed. The district court, complying with the mandate of the court of appeals, has ordered the Secretary to submit his proposed regula-

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[39] In contrast, Section 1861(v) of the Act, 42 U.S.C. (Supp. V) 1395x(v), requires the Secretary to issue regulations defining the "reasonable cost" of medicare services. See *Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F. 2d 663 (C.A. 2). Since the promulgation of regulations was mandatory under the statute at issue in *Kingsbrook Jewish Medical Center*, but is not required under the statutes relevant here, the court of appeals' reliance upon that decision (see Pet. App. 22A) was misplaced.

tions to the court for its review and approval before they may be issued in final form (Pet. App. 71A-72A). But for a court to purport to approve or disapprove merely proposed regulations "would be to render an advisory opinion in its most obnoxious form." *C. & S. Air Lines* v. *Waterman Corp.*, *supra*, 333 U.S. at 113. The "courts are not charged with general guardianship against all potential mischief in the complicated tasks of government." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 146. It is for the administrator, in this case the Secretary, to determine the proper scope and content of any final regulations he promulgates, subject only to subsequent judicial review as the exigencies of litigation may genuinely require. The decision of the court of appeals departs from this appropriate and traditional allocation of executive and judicial powers.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1977.

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 76-1416

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

v.

VENUS MANDLEY, ET AL.

ORDER ALLOWING CERTIORARI

Filed June 6, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is consolidated with No. 76-1159 and a total of one hour is allotted for oral argument.

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No. 76-1159

ARTHUR F. QUERN, ETC., ET AL., PETITIONERS

v.

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